No. 92-887

Supreme Court, U.S.
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Supreme Court of the United States
October Term, 1992

SANFORD J. BERGER, et al.
Petitioners

- vs -

CUYAHOGA COUNTY BAR ASS'N
Respondents

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio

BERGER & FERTEL
SANFORD J. BERGER, *Fertel's Counsel of Record*
ROBERT M. FERTEL, *Berger's Counsel of Record*
1836 Euclid Avenue, Room 305
Cleveland, Ohio 44115-2234
Phone: (216) 781-5950

Lawyers for the Petitioners

Ross Printing Co. - 1846 Euclid Ave. - Cleveland, OH 44115 - (216) 696-1444

QUESTIONS PRESENTED

1. Is the Supremacy Clause of the Constitution of the United States violated when a state Supreme Court assumes initial and primary disciplinary jurisdiction to act as a "Court of Review" as to the reasonableness of a settlement fund division between a federal civil rights lawyer and his client, which fund arose from a successful federal civil rights proceeding in a federal court?

2. Can a state Supreme Court act as a "Court of Review" as to the reasonableness of a settlement fund division between a "prevailing party" client and his lawyer, in a federal civil rights proceeding in a federal court, when there was a client-forced package settlement of the monetary judgment and Section 1988 request for attorney fees?

3. When a federal district court has its own disciplinary Rules; has not adopted the situs state's disciplinary Rules, and has not delegated its disciplinary authority to the situs

state, does the involved federal judge have primary and exclusive jurisdiction to review the ethical conduct of attorneys who have successfully litigated a federal civil rights suit before him?

4. As to the reasonableness of an attorney-client contract for division of a settlement fund in a successfully concluded federal civil rights proceeding, is the reasonableness of the division to be solely determined upon the basis of federal substantive law and federal ethical standards?

5. Is the enforcement of state ethical Rules by a state, against federal civil rights lawyers, preempted by federal law when such state disciplinary proceedings frustrate the purposes and objectives of the federal Civil Rights scheme?

6. Does Garman-type preemption deprive a state Supreme Court of jurisdiction to review, for disciplinary purposes, the reasonableness of a settlement fund division between a federal

civil rights lawyer and his client when such fund arose from a successful civil rights proceeding in a federal court?

7. When a "prevailing party" litigant waives a major portion of the fully compensatory fee he could have received from the defendant to fully compensate his lawyer (thereby aborting an award of attorney fees by the court) does Section 1988 permit the involved lawyer to recover all or part of the fee deficiency from his client?

8. Is a successful lawyer for a "prevailing party" litigant, in a Section 1983 action, the alter ego of that "prevailing party" litigant under the provisions of Section 1988 so that the successful lawyer's claim for a reasonable attorney's fee under Section 1988 is vested, and cannot be unilaterally waived, diluted or settled by the litigant?

9. Are the percentages set forth in a contingent fee contract the maximum amount successful federal civil rights lawyers may receive

when their "prevailing party" client unilaterally waives a major portion of his statutory right to recover a fully compensatory attorney fee from the defendant?

10. Are federal civil rights lawyers the alter ego of federal government attorneys so that they also enjoy federal official immunity regarding their representation of a federal civil rights litigant in a federal court proceeding?

11. When the Ohio Supreme Court has established its own independent, paid, trained, impartial, objective and accountable lawyer-policing entity in the form of the "Office of Disciplinary Counsel," can it then further delegate lawyer-policing authority to private clubs throughout the state of Ohio that can show favoritism for their own club members while singling-out unpopular non-club members for disparate treatment?

12. Are state attorney disciplinary actions invalid and violative of the Equal Protection

Clause of the Fourteenth Amendment when the affected attorneys are victims of selective prosecution by those state disciplinary authorities?

13. Are federal civil rights lawyers denied federal constitutional Due Process when they are deprived of a meaningful opportunity to have their federal claims heard in a state disciplinary proceeding plus being denied the right to sufficiently informed decision-makers?

14. Do the doctrines of res judicata and/or collateral estoppel apply to state disciplinary proceedings when the complaining client waived any objections he might have had to the division of a client-forced settlement fund by not presenting his objections to the involved federal judge, in the first instance, and in a timely manner?

15. Are federal civil rights lawyers denied federal constitutional Due Process by the lack of prior notice that their contemplated conduct in a federal court proceeding could sub-

sequently be construed as unethical by a state disciplinary authority?

PARTIES

From the outset of these proceedings in 1989, Sanford J. Berger and Robert M. Fertel, the Petitioners, were the Respondents in the state court proceedings.

The Cuyahoga County Bar Association, the Respondent herein, was the Relator in those state court proceedings.

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1. and 2. A state cannot venture into a foreign jurisdiction for the purpose of disciplining one of its lawyers on the basis of the state's belief that said lawyer engaged in misconduct in that foreign jurisdiction. 19

3. The authority and domain of a federal district judge over his courtroom and the proceedings therein are sacrosanct, and a state may not seat itself upon his bench, in his absence, to review the conduct of lawyers who had previously appeared before him. 22

4. In the sense of minding one's own business: It is the business of a federal court to apply federal law and standards in determining the reasonableness of the fee charged by a successful civil rights lawyer in a federal proceeding, while it is the business of the state to determine the reasonableness of a lawyer's fee in a state proceeding based upon state law and standards. 23

5. A state may not thwart a federal statutory scheme by immobilizing those federal actors who would set that federal scheme into motion. 25

6. A state may not cross the border separating it from federal territory (based upon the state's own decision that it can cross) and any intrusion by the state into such off-limits territory, without right, justification or invitation, is illegal and void. 28

7. "A lawyer's time and advice are his

stock in trade." (Abraham Lincoln), and when a client waives his right to have someone else pay for his attorney's services to him, then he must reasonably presume that he is personally responsible for the debt owing his lawyer. 28

8. When services are rendered by a professional or tradesman, it is their expectancy that they are going to be paid the reasonable value of those services, and this is especially true when the guarantor is supposedly the United States Congress. 32

9. A successful §1983 lawyer is entitled to receive the reasonable value of his services under §1988, and a contingent fee contract is non-controlling when the client prevents his lawyer from getting that fee from the defendant. 32

10. If federal civil rights lawyers are willing to gamble their time and money in performing services that paid government lawyers would otherwise be performing;

then such private lawyers, at the very least, should be immune from harrassment by state officials while performing those federal duties. 35

11. The police power of state governmental entities can never be delegated to private citizens of that state. 39

12. A predictable danger of selective prosecution exists when a private club of lawyers is delegated the right to determine which lawyers may or may not be allowed to compete with them in the same geographic area. 41

13. The tenets of federal constitutional Due Process are non-existant when affected parties are arbitrarily and unreasonably denied a meaningful opportunity to respond and be heard, especially when coupled with being denied the right to a sufficiently informed decision-maker. 44

14. A federal civil rights lawyer should not have to undergo the risks, rigors and

expense of bringing a federal civil rights suit to a successful culmination only to then have to spend more than 2,000 hours in defending himself against after-the-fact state action (concerning his federal activities) -- which state action is calculated to, and does, destroy his reputation, demean him publicly, and injure him immeasurably and irreparably. 48

15. A lawyer who has engaged in federal court conduct that has not been declared impermissible by the U.S. Supreme Court is denied federal constitutional Due Process, as he had no prior notice that such conduct could be construed as impermissible by the situs state wherein such federal court is situated. 50

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Supreme Court of the United States

October Term, 1992

SANFORD J. BERGER, et al.

Petitioners

- vs -

CUYAHOGA COUNTY BAR ASS'N

Respondent

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

Sanford J. Berger and Robert M. Fertel petition for a writ of certiorari to review an Order of the Supreme Court of Ohio filed on September 2, 1992, which concurred in the findings and recommendations of its Board of Commissioners on Grievances and Discipline, (Board), filed on May 7, 1992 whereby the respondents were suspended from the practice of law in Ohio for a period of one year plus being ordered to pay the costs of the disciplinary proceedings in the amount of $2,117.92.

OPINIONS BELOW

The Opinion of the Supreme Court of Ohio was filed on September 2, 1992, and appears in the Appendix at A26-A31.

The FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS of the Board, filed on May 7, 1992, are found in the Appendix at A7-A23.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The Opinion below was entered on September 2, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(All appearing in Appendix)

The Supremacy Clause, Article VI, Clause 2, of the United States Constitution. (A32)

The Fourteenth Amendment, Section 1, of the United States Constitution. (A32)

42 U.S.C. §1988. (A33)

Ohio Supreme Court's Code of Professional Responsibility.

DR2-106 (A) and (B). (A34)

DR9-102(B)(4). (A35)

Ohio Supreme Court's Rules for the Government

of the Bar.

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STATEMENT OF THE CASE INCLUDING THE RAISING OF THE FEDERAL QUESTIONS

Berger and Fertel were licensed to practice law by the state of Ohio in 1952 and 1972 respectively, and admitted to practice in federal court in 1963 and 1974 respectively. During March, 1981, they associated, and had unblemished professional records until 3/7/89.

Ours is a two-man office with only a typewriter and no help, and since our association, we have specialized in federal civil rights suits, pursuant to 42 U.S.C. §1983. Together, we have presented 14 appeals or cross-appeals to this Court at our own expense. Our first civil rights appeal, which was accepted by this Court, was Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

In 1983, our success in the Sixth Circuit decision in Loudermill v. Cleveland Board of Education, 721 F.2d 550 (CA6,1983), brought a

Daniel Gurish (Gurish) to our office with a §1983 case that had been prepared by another attorney; summary judgment had been granted against him, and he asked if we would take an appeal to the Sixth Circuit Court of Appeals. Gurish had been a Corrections Officer who had been discharged for beating a feeble-minded inmate assigned to his care, and then covering up the beating in his Duty Report. As such, the possibilities of his succeeding at any possible future trial were exceedingly remote and speculative.

We explained to Gurish that appeals cost money; cannot be taken on a contingency basis, and that we charged $200 an hour. Assuring us that he had resources for the cost of the appeal, we then appealed to the Sixth Circuit and the matter was reversed and remanded. Upon remand, a second summary judgment was granted after lengthy opposition, and a second appeal had to be taken wherein we were again successful.

At that point in time, Gurish owed us $40,000 less $2,500 he had given us. We then entered into a 50%-50% contingent fee contract for trial representation.

The case went to trial on 7/28/88; and after five days of trial, the jury returned a surprise verdict of $100,000. The trial court then entered its judgment for $100,000 plus reasonable attorney fees. Our filed Motion for an Award of Attorney Fees, with supporting schedules, asked for $191,000 thereafter. After a one-day hearing before a Magistrate on 2/3/89 (wherein our expert testified as to the reasonableness of our requested fee), the County made a package offer of $130,000 on or about 2/9/89 to settle both the appealed judgment and our attorney fees claims -- which offer was unacceptable to us, but which we were ethically obliged to convey to Gurish.

Representing that he was in dire need of money and could not wait for the appealed judgment to be decided, Gurish demanded that we

immediately accept the offer on his behalf, and it was agreed that the split would be one-half of the judgment amount ($50,000) for him and $80,000 for us to satisfy his appeals and trial obligations owing to us. Of course, that aborted any chance of an award of attorney fees to us by the court.

At that point in time, we were totally satisfied that the settlement division was in complete compliance with federal standards regarding what constituted a reasonable fee under 42 U.S.C. §1988.

The County then presented two claims for payment to the County Commissioners; one in the amount of $100,000, and the second in the amount of $30,000, followed by two Releases. Gurish then came to our office on 3/1/89 to sign the $100,000 Release, we signed the $30,000 Release, and it had been explained to Gurish prior thereto that eventually there would be two checks forthcoming -- one in the amount of $100,000 made payable to the three

of us, and the other for $30,000 made payable to us alone.

As we were soon to discover, Gurish wanted to make sure the money was locked up before he reneged on our agreement, and therefore made no beforehand complaint to either the involved federal judge or us that the agreement was not going to be honored by him.

Shortly thereafter, Gurish discharged us and retained new counsel who filed a dubious "Motion To Cease And Desist" with the federal trial court wherein he now claimed that he was due $100,000 of the settlement fund and the $30,000 was our award of attorney fees. We successfully opposed that Motion, but the trial court refused to intervene further on the basis that it no longer had jurisdiction as the case had been previously marked "Settled and Dismissed." Gurish took no appeal of the dismissal of his Motion to the Sixth Circuit Court of Appeals.

At this point, it is necessary to note that

the involved federal district court has never adopted Ohio's Code of Professional Responsibility, nor delegated its exclusive disciplinary authority (to discipline federal practitioners) to the state of Ohio. Rather, it has its own disciplinary procedures under then Local Rule 2.09 (now 1:5.2), which both provide, in part, as follows:

> Any member of the Bar of the Court may for good cause shown, and after having been given the opportunity to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the Court may deem proper. Any person aggrieved by the conduct of any person practicing before this Court (othr than a pro se litigant) may file a grievance with the Clerk.

On 3/7/89, instead of filing a disciplinary complaint against us with the federal court, Gurish opted to file a disciplinary complaint against Berger with the Cuyahoga County Bar Ass'n (Bar). Therein, he claimed that the settlement fund division was to be $75,000 to him and $55,000 to us, and that Berger was: "Shaking him down!" ... "Strong arming him!" and "I'm being raped by my attorney, and ques-

tion whether he really has my best interest at hart [sic]."

The Bar's 50 member Grievance Committee then conducted an Investigatory Hearing of Berger, and ultimately the Bar filed a Complaint against both of us with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (Board) wherein we were charged with "charging an excessive fee," "failing to pay to a client funds which the client is entitled to receive," and two other charges.

During June, 1989, Gurish sued us in state court and now claimed that he was entitled to $85,000 of the settlement fund. Whereas there is normally a wait of four years for a civil case to be called; this case was partially heard on 5/30/90, and the state trial judge then pushed both parties to settle. The terms of said settlement were that Gurish was to receive $65,000; we were to dismiss Gurish and his new attorney as defendants in a federal

suit we had filed on 1/23/90; Gurish was to dismiss his complaint against us, and the terms of the settlement were to be kept confidential. After receipt of Gurish's letter, the Bar filed an Amended Complaint with a new Count claiming: "Failure to assist in the investigation of a Complaint."

As mentioned, on 1/23/90, we filed a federal action seeking declaratory and injunctive relief against the Bar, the Board, and the Ohio Supreme Court, as well as monetary claims against the Bar, Gurish and his new lawyer. That suit was ultimately dismissed, appealed to the Sixth Circuit, argued on 9/25/92, and decision is awaited at this time. That decision will probably also find its way to this Court.

There was then a hearing before a three-man Panel from the Board on 4/19/91; the Board approved the Panel's FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS more than a year later when they were certified to the

Ohio Supreme Court on 5/7/92 (A7-A23), and by Order of the Ohio Supreme Court on 9/2/92 (A26-A31), we were both suspended for one year plus paying costs.

Note however, par. 19 of the Board Panel's Report, at A17, wherein the Panel discusses the federal suit for no reason other than to prejudice us with the entire Board and the Ohio Supreme Court.

It should also be noted that Berger (as a judicial candidate) brought a federal civil rights suit against the Ohio Supreme Court in 1984 wherein he challenged the "gagging" of judicial candidates. The favorable language in the resultant Opinion, 598 F. Supp. 69 (SD,Ohio,1984), now controls judicial campaigns in Ohio. Currently, Berger was nominated as a candidate for Judge of the Court of Appeals for Cuyahoga County, Ohio on 6/2/92. After his suspension, and although it was not a part of their delegated authority, the Bar filed a Protest against Berger with the County

Board of Elections on 9/14/92, Berger's name was stricken from the ballot on 9/17/92, and the Bar-endorsed candidate took the office by default on 11/3/92.

We initially raised our federal constitutional and statutory claims, orally and in writing, with the Bar's Grievance Committee, and the Bar never responded.

On 11/7/90, we filed our Motion To Dismiss the disciplinary Complaint against us for lack of jurisdiction based upon three theories: (1) Federal preemption; (2) Supremacy Clause prohibition, and federal official immunity. That Motion was overruled by Fred Oremus, the Board Chairman, on 1/4/91, (A1-A2). His ENTRY holding, in effect, that the jurisdiction of the state of Ohio to discipline its licensed lawyers for claimed federal court misconduct was "beyond question," and that a hearing panel would determine the reasonableness of our requested fee by applying the law "[i]ncluding the terms of 42 USC §1988 as interpreted by

the U.S. Supreme Court. Venegas v. Mitchell, 110 S.Ct. 1679(1990)."

On 2/8/91, we filed a second Motion To Dismiss the Amended Complaint with the Board. On page 6, we claimed that there was no U.S. Supreme Court precedent that our requested fee was unreasonable; and accordingly, we could not be disciplined for charging a "clearly excessive fee." On page 8, we claimed that (as non-Bar members) we were the victims of selective prosecution, and attached Exhibits that disclosed that active Bar members escaped Bar disciplinary proceedings. (See comment at A5-A6).

This second Motion To Dismiss was overruled by the Panel Chairman on 3/29/91. (A3-A6). It was specifically held that "[t]he Ohio Supreme Court may sanction an Ohio lawyer for misconduct that grows out of federal court action." (A5). The 3/29/91 Entry then goes on to say that the state of Ohio has the right to review a federal court proceeding and apply federal

standards (rather than their own) in determining if there has been a violation of Ohio ethical standards by conduct occurring in a federal court proceeding. (A5).

On 4/11/91. we filed our Answer to the Amended Complaint and raised our federal constitutional and statutory claims as Affirmative Defenses. Also raised at the 4/19/91 hearing.

Following the Panel hearing of 4/19/91, we filed a 26 page Post-Hearing Brief wherein we again raised our federal constitutional and statutory defenses. Therein, we also claimed that the Bar had failed to introduce any evidence regarding the eight (8) mandatory factors of Ohio's DR2-106(B), at A34-A35, which would give rise to the conclusion that DR2-106(A) had been violated with respect to our having charged "a clearly excessive fee." (A34). We further claimed that our requested fee was consistent with the purposes of §1988; was reasonable under the 8 factors of Ohio's DR2-106(B), and that the charge of failing to

disburse funds "[w]hich the client is entitled to receive."], Ohio's DR9-102(B)(4), (A35), was inconsistent with Ohio law and federal ethical standards.

On 5/11/92, the Ohio Supreme Court issued its Order To Show Cause permitting us to file Objections thereto by 6/1/92. In response, we filed our 5/28/92 Motion To Abstain or in the alternative Motion For Extension Of Time To File Objections and Brief. Therein, we asked the Ohio Supreme Court, as the final decision-maker, to rule upon our prior 11/7/90 and 2/8/91 Motions To Dismiss the Complaints and Amended Complaints filed against us by the Bar with the Board, and to refrain from acting until our substantial federal constitutional and statutory claims were decided by the Sixth Circuit Court of Appeals. Our alternative Motion was for the purpose of providing us with a meaningful opportunity to respond to the charges against us.

Said requests for rulings (regarding our

federal constitutional and statutory preemption claims and the Court's jurisdiction) were then repeated in our 6/17/92 Response Brief to the Bar's Brief Opposing our Motion To Abstain.

Both of our Motions were then denied by the Ohio Supreme Court on 6/24/92, (A24), with no ruling on our two Motions To Dismiss.

On 6/26/92, we filed our Motion To File Additional Objections Instanter, and tendered those Additional Objections. Therein, we again noted that we had presented prior Objections in our two Motions To Dismiss; our Post-Panel Hearing Brief of 5/18/91, and our 5/28/92 and 6/17/92 pleadings before the Ohio Supreme Court, and requested oral argument "[on] the complex legal issues involved." The first sentence of those Additional Objections said:

> For whatever reasons, the May 7, 1992 Findings of Fact and Conclusions of Law of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio are one-sided, misleading, slanted, erroneous and replete with errors.

Those Additional Objections comprised nine (9) pages of detail regarding the claimed

biasness of the Board's Report. Additionally, we again raised federal preemption of the type involved in San Diego Building Trades Council v. Garman, 359 U.S. 236 (1959); advised of this Court's decision in Gade v. National Solid Waste Management Ass'n, __U.S.__,__, 112 S.Ct. 2374,2386 (1992), concerning the preemption of federal standards over state standards, and that it is mandatory for a state Supreme Court to decide a Garman-type preemption claim when raised, and that such preemption renders a state court judgment void ab initio as set down in Longshoremen v. Davis, 476 U.S. 390, 392 (1986).

On 7/30/92, our Motion To File Additional Objections Instanter was denied, (A25), even though said Motion was unopposed.

Since the commencement of the attack upon us by the state of Ohio in March, 1983, we have expended more than 2,000 hours in attempting to defend ourselves; we have not been able to undertake requested representations of

victims of claimed civil rights violations, and have been unable to perfect appeals of meritorious civil rights cases to the Sixth Circuit. As such, the current suspension is almost after-the-fact, as the state has virtually put us out of the business of civil rights litigation for the 3½ years preceding the current suspension.

A careful reading of the Board's Findings, etc. (A7-A23), will disclose that there is no enumeration of the required federal factors (such as set forth in Krause v. Rhodes, 640 F.2d 214,220 (CA6,1981)) or the required state factors (as contained in DR2-106(B)) that would give rise to the conclusion that a "clearly excessive fee" had been charged.

REASONS FOR GRANTING THE WRIT

1.and 2. A STATE CANNOT VENTURE INTO A FOREIGN JURISDICTION FOR THE PURPOSE OF DISCIPLINING ONE OF ITS LAWYERS ON THE BASIS OF THE STATE'S BELIEF THAT SAID LAWYER ENGAGED IN MISCONDUCT IN THAT FOREIGN JURISDICTION.

Insofar as the federal court system is concerned, it is a foreign jurisdiction that the state of Ohio dare not trespass into.

In Venegas v. Mitchell, 495 U.S. 82,90 (1990), the question as to the extent of the federal courts' authority to supervise contingent fees was left open, but no mention was made as to state supervision of contingent fee contracts in a federal proceeding. As previously discussed on pp.13-14, supra, Ohio took the position that it could review a prior federal court determination. (A1 and A3).

However, such state conduct constitutes the type of review of a federal court determination that was condemned in Sperry v. Florida, 373 U.S. 379,385 (1963). At p.42 of Sperry, it

was then held that a state maintains the control of the practice of law within its borders except to the limited extent necessary for the accomplishment of federal objectives. Also, the relative importance to the state of its own law is not material when there is a conflict with valid federal law. Fidelity Federal Svgs. & Loan Ass'n v. De La Questa, 458 U.S. 141,152 (1982) and Gade v. National Solid Waste Mgmt. Ass'n, supra, 2388, wherein state regulation of the involved professions, standing alone, was rejected as a valid defense due to federal preemption.

As such, the issue is whether Congress intended to permit state regulation in the determination of attorney fees for federal civil rights lawyers. Wisconsin Public Intervenor v. Mortier, __U.S.__,__, 111 S.Ct. 2476,2481 (1991). That is, are federal civil rights lawyers in Ohio obliged to first submit their proposed fee to the state of Ohio for its pre-approval, hereafter, before they can conclude

a federal court proceeding?

A long line of cases by this Court discusses federal field preemption; the high Congressional priority of the federal civil rights statutory scheme, and the need to induce private lawyers to obtain judicial enforcement of the federal civil rights laws. See Pacific Gas & Electric Co. v. State Energy Resource, etc., 461 U.S. 190,203 (1983); Kay v. Ehrler, __U.S.__,__, 111 S.Ct. 1435,1437 (1991); Newman v. Piggie Park Enterprises, 390 U.S. 400,402 (1968); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54,63 (1980); County of Riverside v. Rivera, 477 U.S. 561,577 (1986), and Pennsylvania v. Delaware Citizens Council For Clean Air, 483 U.S. 711,726 (1987).

In our case, the involved federal judge refused to intervene after the case had been marked as "Settled and Dismissed," but an attorney fee dispute between an attorney and his client is collateral to the merits of the claims for relief, Sprague v. Triconic Nation-

al Bank, 307 U.S. 161,170 (1939), so that he did have jurisdiction even after the final entry. Willy v. Coastal Corp., __U.S.__,__, 112 S.Ct. 1076,1080 (1992). He should have helped us, and avoided all that has happened.

3. THE AUTHORITY AND DOMAIN OF A FEDERAL DISTRICT JUDGE OVER HIS COURTROOM AND THE PROCEEDINGS THEREIN ARE SACROSANCT, AND A STATE MAY NOT SEAT ITSELF UPON HIS BENCH, IN HIS ABSENCE, TO REVIEW THE CONDUCT OF LAWYERS WHO HAD PREVIOUSLY APPEARED BEFORE HIM.

The ethical standards adopted, and how applied, are matters of federal law. In Re American Airlines, Inc., 972 F.2d 605,610 (CA5,1992). It is also the involved judge who is in the best position to resolve issues that emanate from litigation that he has been involved in. Pierce v. Underwood, 487 U.S. 552,559 (1988), citing Miller v. Fenton, 474 U.S. 104,114 (1985); Hensley v. Eckerhart, 461 U.S. 424,437 (1983) and Commissioner, I.N.S. v. Jean, 496 U.S. 154,___, 110 S.Ct. 2316,2320

(1990).

Although Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423,432 (1982), held that a state has an important interest in the regulation of its attorneys; and such holding was based on the power of the state Supreme Court to establish ethical standards, nevertheless, the ethical standards for federal court lawyers are matters of federal law. In Re Snyder, 472 U.S. 634,645 n.6 (1985).

4. IN THE SENSE OF MINDING ONE'S OWN BUSINESS: IT IS THE BUSINESS OF A FEDERAL COURT TO APPLY FEDERAL LAW AND STANDARDS IN DETERMINING THE REASONABLENESS OF THE FEE CHARGED BY A SUCCESSFUL CIVIL RIGHTS LAWYER IN A FEDERAL PROCEEDING, WHILE IT IS THE BUSINESS OF A STATE TO DETERMINE THE REASONABLENESS OF A LAWYER'S FEE IN A STATE PROCEEDING BASED UPON STATE LAW AND STANDARDS.

The interests of federalism are not supported when the outcome of a federal claim depends upon whether it is made by a state or

federal court. Felder v. Casey, 487 U.S. 131, 151 (1988). If Congress did not intend to assign to state courts the role of defining and characterizing the essentials of a federal cause of action, Felder v. Casey, 142, then Congress surely did not intend to assign to state courts the determination as to what constitutes a reasonable fee in a federal civil rights proceeding.

Permitting state regulation herein risks the development of conflicting principles concerning what constitutes a reasonable fee, Litton Financial Printing Division v. NLRB, __U.S.__,__, 111 S.Ct. 2315,2223 (1991), and will create a dual enforcement scheme wherein the substantive law depends upon the choice of forum. Salve Regina College v. Russell, __U.S. __,__, 111 S.Ct. 1217,1222 (1991).

Cippolone v. Liggett Group, Inc., __U.S.__, __, 112 S.Ct. 2608,2617 (1992) (plurality opinion) stated that since McColloch v. Maryland 17 U.S. (4 Wheat) 316 (1819), any state law

that conflicts with federal law is "without effect." In that light, any state attorney ethical standards that are contrary to federal attorney ethical standards should also be considered to be "without effect."

5. A STATE MAY NOT THWART A FEDERAL STATUTORY SCHEME BY IMMOBILIZING THOSE FEDERAL ACTORS WHO WOULD SET THAT FEDERAL SCHEME INTO MOTION.

Felder v. Casey, supra, 138, discussed whether a state notice-of-claim statute was consistent with the goals of §1983, or if it stood as an obstacle to the full accomplishment of the purposes and objectives of the federal Act, so as to be preempted thereby. Query then. Is the state action herein consistent with the goals of §1988? For example, in Venegas v. Mitchell, supra, 89, the contingent fee contract was upheld on the basis that it was consistent with the Congressional purposes of §1988.

Gade v. National Solid, etc., supra, 2386, found the state activity therein to be pre-

empted, as there was an impermissible effect upon a federal statutory policy. Moreover, the determination of the "objective reasonableness" of an attorney's pre-filing conduct (for the purposes of sanctions under F.R.C.P. 11) creates a real risk of detering the filing of meritorious cases. Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., __U.S.__,__, 111 S.Ct. 922,941 (1991) (Kennedy, J., dissenting). Herein, by permitting after-the-fact state regulation, also creates a real risk of deterring the filing of meritorious §1983 actions.

In Business Guides, supra, 941, Justice Kennedy recognized that federal fee-shifting statutes reflect policy choices by Congress regarding the extent to which certain types of litigation should be encouraged or discouraged. Also, Chambers v. Nasco, Inc., __ U.S.__,__, 111 S.Ct. 2123,2137 (1991), citing Alyska Pipeline Services, Inc. v. Wilderness Society, 421 U.S. 240, 260-263 (1975).

As noted in Justice Blackmun's dissent in Burlington v. Dague, __U.S.__,__, 112 S.Ct. 2638,2644 (1992):

> Preventing attorneys who bring actions under fee-shifting statutes from receiving fully compensatory fees will harm far more than the legal profession. Congress intended the fee-shifting statutes to serve as an integral enforcement mechanism in a variety of federal statutes -- most notably, civil rights and environmental statutes ...

Also, Justice O'Connor's dissent, at 2648.

We were also found guilty of failing to disburse funds that a client was clearly "entitled to," but that is inconsistent with federal standards, as Gurish wasn't "entitled to" the disputed funds, as our "retaining lien" was ethically justified due to his reneging on our deal. Federal Land Bank of Jackson v. Federal Intermediate Credit Bank of Jackson, 128 FRD 182,186 (SD,Miss,1989) and Lucky Goldstar Int'l Mfg. Sales Co., 636 F. Supp. 1059,1064 (ND,Ill,1986). Nor was it possible to cash a check with three payees thereon when one refused to endorse.

6. A STATE MAY NOT CROSS THE BORDER SEPARATING IT FROM FEDERAL TERRITORY (BASED UPON THE STATE'S OWN DECISION THAT IT CAN CROSS), AND ANY INTRUSION BY THE STATE INTO SUCH OFF-LIMITS TERRITORY, WITHOUT RIGHT, JUSTIFICATION OR INVITATION, IS ILLEGAL AND VOID.

In San Diego Building Trades Council v. Garman, supra, 247, it was held that any state action that has the potential for governing federal policy is preempted, and there is a conflict with federal policy when two law-making sources are permitted to govern the same conduct. Also, Brown v. Hotel Employees, 468 U.S. 491,502 (1984).

7. "A LAWYER'S TIME AND ADVICE ARE HIS STOCK IN TRADE." (ABRAHAM LINCOLN), AND WHEN A CLIENT WAIVES HIS RIGHT TO HAVE SOMEONE ELSE PAY FOR HIS LAWYER'S SERVICES TO HIM, THEN HE MUST REASONABLY PRESUME THAT HE IS PERSONALLY RESPONSIBLE FOR THE DEBT OWING HIS LAWYER.

It is illogical that Congress could have possibly intended that the decision as to

whether or not a successful lawyer (pursuant to §1988) should get a reasonable fee for his services is totally within the discretion of a §1983 client who inevitably becomes greedy, ungrateful, devious and treacherous when he no longer needs the services of his lawyer.

Since §1988 is silent as to the rights of a successful federal civil rights lawyer, this Court must be guided by the goals and policies of §1988 in making such determination. International Paper Co. v. Ouellette, 479 U.S. 481,493 (1987).

Evans v. Jeff D., 475 U.S. 717,729 (1986), held that a §1983 client can bargain away his attorney's fees as a quid pro quo for relief that was equal or greater than he would have obtained at trial. But, we succeeded on two pre-trial appeals and at trial.

In Venegas v. Mitchell, 85, an award of a reasonable fee had been made, and the issue was whether a contingent fee contract in excess of the award could be enforced. But

our client aborted our right to have the federal district court determine the reasonable value of our services.

Since neither of the above two cases control our situation, it is our position that we are the alter ego of the "prevailing party" language of §1988, and have vested rights thereunder independent of any rights of the client.

It has been repeatedly said that Congress, by enacting §1988, determined that there must be an inducement to attract private counsel, and that motivating inducement is supposed to be a "guaranteed" reasonable fee. Hensley v. Eckerhart, supra, Blum v. Stetson, 465 U.S. 886,897 (1984), County of Riverside v. Rivera supra, Pennsylvania v. Delaware Valley, etc., supra, Blanchard v. Bergeron, 489 U.S. 87,96 (1989), and Kay v. Ehrler, supra.

As to vested rights, a federal statute can contain explicit rights, as well as implicit rights. Golden State Transit Authority v.

City of Los Angeles, 493 U.S. 103,112 (1989).

The inquiry then, as to whether §1988 creates implicit statutory rights, is whether the attorney's fee provision is intended to benefit successful civil rights lawyers. If the answer is "Yes," then the statute creates enforceable rights, unless it reflects a mere "congressional preference" instead of a binding obligation, or unless the interest is "too vague and amorphous" so that it is "beyond the competence of the judiciary to enforce." Wilder v. Virginia Hpospital Ass'n, 496 U.S. 498,509 (1990). It would seem then, that the receipt of a reasonable attorney's fee falls within the realm of a binding obligation, rather than a mere "congressional preference."

As such, and unlike Suter v. Artist M., __ U.S.__,__, 112 S.Ct. 1360,1368 (1992), §1988 (and its legislative history) contain sufficient statutory guidance for the determination of a reasonable attorney's fee. Nor can it be

said that the determination of a reasonable fee for a successful §1983 lawyer is "too vague and amorphous" so as to be "beyond the competence of the judiciary to enforce."

8. WHEN SERVICES ARE RENDERED BY A PROFESSIONAL OR TRADESMAN, IT IS THEIR EXPECTANCY THAT THEY ARE GOING TO BE PAID THE REASONABLE VALUE OF THOSE SERVICES, AND THIS IS ESPECIALLY TRUE WHEN THE GUARANTOR IS SUPPOSEDLY THE UNITED STATES CONGRESS.

Same argument as 7, supra.

9. A SUCCESSFUL §1983 LAWYER IS ENTITLED TO RECEIVE THE REASONABLE VALUE OF HIS SERVICES UNDER §1988, AND A CONTINGENT FEE CONTRACT IS NON-CONTROLLING WHEN THE CLIENT PREVENTS HIS LAWYER FROM GETTING THAT FEE FROM THE DEFENDANT.

Implicit in a federal civil rights lawyer's contract with his client is the implied promise by the client that if the lawyer is successful in representing him then the lawyer can unimpededly proceed to obtain additional

monies from the defendant.

Burlington v. Dague, 2643, invalidated contingency multipliers on the basis that they were inconsistent with this Court's prior decisions rejecting the contingent fee model for federal fee-shifting cases, citing Venegas v. Mitchell, 87, and Blanchard v. Bergeron, 96.

Our client's case was a dog of a case, as it only involved a claim of a procedural Due Process violation, where there is no presumption of monetary damages flowing from the deprivation thereof. Carey v. Piphus, 435 U.S. 247 (1978). As such, the case did not involve a substantial chance of a large monetary judgment which would have been sufficient to find counsel -- absent an attorney fee award. Pennsylvania v. Delaware, etc..

Several lower court non-civil rights cases have held that the appropriate standard for determining an attorney's fee from his client is one of reasonableness under the circum-

stances; that such determination is not limited to the face of a contingent fee contract; that the fee determination is not limited to when the fee agreement was made, but must also consider the circumstances surrounding its enforcement, and when an alternative method is not expressly dictated, the customary procedure is to use the "lodestar" method. McGill v. Ottawa, 774 F. Supp.1473,1474 (D,Kan,1991); In Re San Juan Dupont Plaza Hotel Fire Litigation, 768 F. Supp. 912,921 (D,PR,1991); Rosquist v. Soo Line RR, 692 F.2d 1107,1112 (CA7,1982); Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 526 (CA1,1991); McKenzie Construction Co. v. Maynard, 758 F.2d 97,100 (CA3,1985); Krause v. Rhodes, 640 F.2d 214,220 (CA6) cert. den'd 454 U.S. 836 (1981). Just recently, Walitalo v. Iacocco, 968 F.2d 741,747 (CA8,1992), wherein a federal fee-shifting statute was involved, and it was held that the "lodestar" method is the only approach that is fair to

all of the parties, and assures that the lawyer will not be over or under compensated.

10. IF FEDERAL CIVIL RIGHTS LAWYERS ARE WILLING TO GAMBLE THEIR TIME AND MONEY IN PERFORMING SERVICES THAT PAID GOVERNMENT LAWYERS WOULD OTHERWISE BE PERFORMING; THEN SUCH PRIVATE LAWYERS, AT THE VERY LEAST, SHOULD BE IMMUNE FROM HARRASSMENT BY STATE OFFICIALS WHILE PERFORMING THOSE FEDERAL DUTIES.

In Barr v. Matteo, 360 U.S. 564 (1959) and Howard v. Lyons, 360 U.S. 593,597 (1959), it was held that the scope of absolute official immunity afforded federal employees is a matter of federal law "[to] be formulated by the Courts in the absence of legislative action by Congress." Federal official immunity is applicable whenever state action would "[s]hackle the fearless, vigorous and effective administration of policies of the (federal) government." Westfall v. Ervin, 484 U.S. 292,297 (1988).

The question then is whether lawyers for

federal civil rights plaintiffs can be considered as federal employees for official immunity purposes? The answer follows.

In Edmonson v. Leesville Concrete Co., __ U.S.__,__, 111 S.Ct. 2077,2086 (1991), it was held that when the government delegates a function to private parties, such function retains its governmental character. It is the function within the governmental system that determines whether actions of private parties can fairly be attributed to the government. Ibid, at 2086, citing West v. Atkins, 487 U.S. 42 (1988).

Although the two cases above dealt with the issue as to whether the conduct of private parties could be considered as "state action" for purposes of a §1983 action, that same rationale should also be applied in determining whether our actions can be considered as actions of the federal government for federal immunity purposes.

Prevailing federal civil rights plaintiffs

are Congress' chosen instruments in the enforcement of the federal Civil Rights Act, Newman v. Piggie Park Enterprises, Inc., 402; Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412,418 (1978) and Independent Association of Flight Attendants v. Zipes, 491 U.S. 754,759 (1989), while an attorney acting or failing to act, in furtherance of litigation is the party's agent. Coleman v. Thompson, __U.S.__,__, 111 S.Ct. 2546,2566 (1991); Link v. Wabash Railroad Co., 370 U.S. 626,634 (1962) and Irwin v. Veterans Administration, 498 U.S.___,___, 111 S.Ct. 453,456 (1990).

Federal civil rights lawyers, in enforcing the federal Civil Rights Act, are not only benefitting their own interests, but also the interests of society as a whole. County of Riverside v. Rivera, 574.

Unlike the attorney in Ferri v. Ackerman, 444 U.S. 193,201 (1980) (which denied federal official immunity to a federal public defender from a state court malpractice action),

federal civil rights lawyers are not acting in an adversarial relationship to the U.S. government. Rather, they are advancing a federal statutory policy that otherwise would have to be furthered by paid federal government attorneys -- or in other words, they are the alter ego of federal government lawyers.

We deal in a fiction and close our eyes to reality when we think that it is federal civil rights plaintiffs who are enforcing the federal Civil Rights Act. That concept is tantamount to believing that it is Don King who is doing the fighting in the ring. It is necessary that one be beaten up with regularity, however, before he can understand how totally fallacious that concept really is.

A cursory re-examination of the facts in this case will reveal that it is not our ex-client who has done any bleeding or has any scars to show for the battles that were, and are still, being waged.

11. THE POLICE POWER OF STATE GOVERNMENTAL ENTITIES CAN NEVER BE DELEGATED TO PRIVATE CITIZENS OF THAT STATE.

Asked in another manner: can the city of Cleveland, having a trained, experienced and accountable police department in existence, then delegate that identical police authority to the Ku Klux Klan, the Hell's Angels or the Black Panthers?

We both feel that we are able researchers; but when we were unable to find any precedent on this question, we paid an expert to research Lexis and Westlaw, and he was unable to find anything. The only conclusion then is that the concept is so absurd that it has never been tried by any governmental entity, excepting the Ohio Supreme Court.

The closest we could come to an answer was the case of Brookpark Entertainment, Inc. v. Taft, 951 F.2d 710 (CA6,1991), wherein the Ohio Department of Liquor Control had found a liquor law violation by a "nudie bar," but it

also determined that the violation did not warrant any sanctions being imposed for that violation. However, Ohio had a referendum law permitting the voters of the local precinct wherein the liquor establishment was located to revoke the bar's liquor license by referendum. In holding that the referendum law violated the Fourteenth Amendment's Due Process Clause, the Sixth Circuit said this:

> ... the Ohio law is not a valid delegation of legislative power because it allows voters to permanently close only those establishments that they dislike.
> * * * * * * * * * * *
> The concern is that the voters might 'gang up' to drive out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest. This is a distinct type of arbitrary action that the requirement of fair procedure is designed to prevent, or at least make less likely to occur.

We remember only too well when Berger was gang-jumped by approximately 50 lawyers at the Bar's Roman Holiday Investigatory Hearing; was denied the right to face or cross-examine his accuser, and was then only allowed 3 minutes for his defense. This may possibly con-

stitute a "fair procedure" in the Bar's eyes, but it was cowardly in our eyes.

Gangs are the gatherings of cowards and bullies who endeavor to find the strength in numbers that they lack individually -- and it matters little whether they are costumed in white robes with hoods, brown shirts, leather motorcycle jackets or three-piece suits -- they attack and judge that which they choose not to understand or tolerate, while delighting in feeding-frenzies of abusiveness.

It is inherently wrong to delegate police power to the irresponsible.

12. A PREDICTABLE DANGER OF SELECTIVE PROSECUTION EXISTS WHEN A PRIVATE CLUB OF LAWYERS IS DELEGATED THE RIGHT TO DETERMINE WHICH LAWYERS MAY OR MAY NOT BE ALLOWED TO COMPETE WITH THEM IN THE SAME GEOGRAPHIC AREA.

It is not uncommon for state bar associations to bring disciplinary actions against unpopular or unorthodox attorneys. Zauderer v. Disciplinary Counsel of the Ohio Supreme

Court, 471 U.S. 626,666-667 n.106 (1985) (Brennan, J., concurring in part and dissenting in part).

As non-Bar members, we presented evidence to the Board (A5-A6) that we were being subjected to disparate treatment as contrasted with active Bar members. But nowhere in the Board's Findings, etc. (A7-A23) is there any mention as to why Bar members had immunity from local Bar disciplinary proceedings.

Marshall v. Jericho, Inc., 446 U.S. 238, 249 (1980), held that prosecutional discretion is not immunized from federal constitutional Due Process scrutiny if it is motivated by improper factors, or is otherwise contrary to law.

Further, claims of selective prosecution are to be determined pursuant to traditional Equal Protection analysis. Wayte v. United States, 470 U.S. 598,608 (1985).

As noted on page 18, supra, there was no mention by either the Board or the Supreme

Court of Ohio as to what federal or state standards had been violated that would give rise to the conclusion that an "excessive fee" had been charged, although Ohio's disciplinary Code (DR2-106(B)) has established eight factors to be used as guidelines for the determination of a reasonable attorney's fee. Fox and Associates Co., L.P.A. v. Purdon, 44 Ohio St.3d 69,71 (1989).

As such, the failure to follow established standards creates a situation wherein discriminatory and selective enforcement can occur. For example, vague standards create a situation wherein discriminatory enforcement is a real possibility. Gentile v. State Board of Nevada, __U.S.__,__, 111 S.Ct. 2720,2732 (1991). In other words, whether it be ignored standards or vague standards, selective prosecution is calculated to happen.

13. THE TENETS OF FEDERAL CONSTITUTIONAL DUE PROCESS ARE NON-EXISTANT WHEN AFFECTED PARTIES ARE ARBITRARILY AND UNREASONABLY DENIED

A MEANINGFUL OPPORTUNITY TO RESPOND AND BE HEARD, ESPECIALLY WHEN COUPLED WITH BEING DENIED THE RIGHT TO A SUFFICIENTLY INFORMED DECISION-MAKER.

In Zauderer v. Office of Disciplinary Counsel, Ohio Supreme Court, supra, it was determined that the Ohio Supreme Court's disciplinary Rules appear to provide ample opportunity for an attorney to respond to the Board of Commissioner's Recommendations.

However, a state staute or rule may be held constitutionally invalid when it operates to deprive individuals of a protected right, although its general validity is without question. Boddie v. Connecticut, 401 U.S. 371,379 (1971).

Further, federal constitutional Due Process can be denied by a state law, on its face, or as applied. Barry v. Barchi, 443 U.S. 55, 66 (1979).

The overruling of our Motion For An Extension Of Time To File Objections (A24) coupled

with the denial of our Motion To File Additional Objections Instanter (A25) prevented us from having a meaningful opportunity to respond -- in violation of federal constitutional Due Process.

Mathews v. Eldridge, 424 U.S. 319,335 (1976), set down three factors to be considered in determining the federal constitutional Due Process sufficiency of state procedures.

The first factor is the private interest involved. In that regard, the right to practice law is a "fundamental right." Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281 (1985).

The second factor is the risk of erroneous deprivations pursuant to present procedures and the decrease of the risk by use of substitute or additional procedures. In that regard, McKenzie Construction Co. v. Maynard, supra, held that a requested attorney's fee may be "objectively unreasonable," but not so

"clearly excessive" as to be subject to disciplinary sanctions, so that the affected attorney is entitled to a determination in accordance with the correct legal standards. We were deprived of a "fundamental right" by the total absence of any standards.

The ~~third~~ factor is the governmental interest involved, including any additional administrative ard fiscal burdens. In answer, if the state had permitted the involved federal district court judge to make the initial determination as to whether or not there had been a violation of federal ethical standards, as was his right, such procedure would have decreased (rather than increase) the administrative and fiscal expenses incurred by the state of Ohio in these disciplinary proceedings. Moreover, there is no state interest in disciplining federal civil rights lawyers, who were involved in a federal civil rights proceeding in a federal district court, when their conduct was consistent with federal

substantive and/or ethical law, and any state sanctions should be barred by the Supremacy Clause of the U.S. Constitution.

Consequently, a consideration of the three (3) factors set down in Mathews v. Eldridge, above, leads to but one inescapable conclusion; and that is, we were denied our federal constitutional Due Process right to a meaningful hearing when the initial determination of our ethical conduct was determined by the state of Ohio instead of the involved federal judge.

Additionally, the mass of federal constitutional and statutory law cited by us at every stage of the disciplinary proceedings was meaningless, as the decision-makers were state law practitioners, not federal constitutional law practitioners.

14. A FEDERAL CIVIL RIGHTS LAWYER SHOULD NOT HAVE TO UNDERGO THE RISKS, RIGORS AND EXPENSE OF BRINGING A FEDERAL CIVIL RIGHTS SUIT TO A SUCCESSFUL CULMINATION ONLY TO THEN HAVE TO

SPEND MORE THAN 2,000 HOURS IN DEFENDING HIMSELF AGAINST AFTER-THE-FACT STATE ACTION (CONCERNING HIS FEDERAL ACTIVITIES) -- WHICH STATE ACTION IS CALCULATED TO, AND DOES, DESTROY HIS REPUTATION, DEMEAN HIM PUBLICLY, AND INJURE HIM IMMEASURABLY AND IRREPARABLY.

In Re Kirsch, 973 F.2d 1454,1461 (CA9, 1992), recently held that the Rules of Professional Conduct were never intended to protect clients who wrong their lawyers. In our case, our ex-client would never have dared to file disciplinary charges against us with the federal judge who heard his case and knew him intimately.

In F.D.I.C. v. Moitie, 452 U.S. 394,398 (1981), it was held that the failure to appeal from a judgment (overruling of Gurish's Motion To Cease and Desist), page 7, supra, provides res judicata and/or collateral estoppel effect to any issue that was decided, or could have been decided, by such judgment.

Moreover, mutuality of parties (the Bar

instead of Gurish) is not necessary for the applicability of res judicata if the affected party had a full and fair opportunity to litigate the issue in a prior proceeding. See Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971) and Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

As we have learned, when a federal civil rights plaintiff has the option to file his gripe with state disciplinary authorities, then he has tremendous coercive power to not only defeat his attorney's right to a reasonable fee, but also finds himself as the beneficiary of a windfall that he was never entitled to.

15. A LAWYER WHO HAS ENGAGED IN FEDERAL COURT CONDUCT THAT HAS NOT BEEN DECLARED IMPERMISSIBLE BY THE U.S. SUPREME COURT IS DENIED FEDERAL CONSTITUTIONAL DUE PROCESS, AS HE HAD NO PRIOR NOTICE THAT SUCH CONDUCT COULD BE CONSTRUED AS IMPERMISSIBLE BY THE SITUS STATE

WHEREIN SUCH FEDERAL COURT IS SITUATED.

In paragraph 23 of the Board's Findings, etc. (A19-A20), the Board concluded, and the Ohio Supreme Court agreed, that "[the] settlement of Guris' federal claims resulted in a fund of $130,000 held for the benefit of the client. Venegas v. Mitchell, 110 S.Ct. 1679 (1990)."

However, as previously argued herein, the division of that fund must not only further the compensatory purposes of §1983, but must also further the Congressional purpose of §1988 in attracting experienced and competent counsel.

We have also shown that our situation was distinguishable from that in Venegas v. Mitchell, so that case is hardly controlling.

Accordingly, there was no prior precedent from this Court that our requested fee was contrary to §1988, so that the subsequent disciplinary proceedings by the state of Ohio constituted a violation of our federal con-

stitutional right to Due Process due to a lack of prior notice that such conduct could possibly be construed as wrongful. In Re Ruffalo, 390 U.S. 544,554 (1968) (White, J., concurring). Also, In Re Finklestein, 901 F.2d 1560,1564 (CA11,1990); Securities Industry v. Clarke, 898 F.2d 318,321 (CA7, 1990), and Boettcher v. Hartford Insurance Cc., 927 F.2d 23,26 (CA1,1991).

CONCLUSION

As explained, there are numerous holes that now exist in §1988 -- holes which the Ohio Supreme Court has pushed us into -- and holes which should be addressed and filled by this Court if it is felt that a state should not be allowed to effectively repeal the existant federal civil rights legislation.

As such, it would seem that the questions we have presented to this Court fit squarely within this Court's Rule 10.1(c).

Because of all that has happened, and the legal arguments offered as to why it never

should have happened, or again happen to some other civil rights lawyers, it is respectfully urged that this petition for a writ of certiorari be looked upon favorably.

Respectfully submitted,

BERGER & FERTEL

SANFORD J. BERGER, Fertel's Counsel of Record
ROBERT M. FERTEL, Berger's Counsel of Record
1836 Euclid Ave., Room 305
Cleveland, Ohio 44115-2234
Phone: (216) 781-5950

Lawyers for the Petitioners

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	( )	FILED JAN 4,1991
Complaint against: Sanford Berger and Robert M. Fertel,	( )	CASE NO. 90-61
RESPONDENTS,	( )	ENTRY
Cuyahoga County Bar Association,	( )	
RELATOR.	( )	

The Respondent's motion to dismiss the complaint filed by the Relator is hereby overruled.

The Board's jurisdiction over the persons of the Respondents as Ohio attorneys is beyond question. A hearing panel appointed in this matter will weigh the evidence related to the subject matter set forth in the complaint and apply the law including the terms of 42 USC §1988 as interpreted by the U.S. Supreme Court. See Venegas v. Mitchell, 110 S.Ct. 1679(1990). Respondents are given until January 25, 1991 to file their Answer.

This entry is dated this 4th day of January, 1991 and this case is continued.

/s/ Frederick L. Oremus
FREDERICK L. OREMUS, ESQ.
Chairman, Board of Commissioners
on Grievances and Discipline of
The Supreme Court of Ohio

/s/ JWM
per telephone authority
1-4-91

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	( )	FILED MAR 29, 1991
Complaint against: Sanford Berger and Robert M. Fertel,	( )	Case No. 90-61
RESPONDENTS	( )	
Cuyahoga County Bar Association	( )	ENTRY
RELATOR.	( )	

Respondents have moved to dismiss the amended complaint on the grounds that the Board has no jurisdiction over the person of the Respondents and the subject matter.

Respondents Sanford Berger and Robert Fertel are attorneys at law admitted to practice in the state of Ohio. The law is quite clear that the Supreme Court of Ohio has jurisdiction over its attorneys who are charged with misconduct, Section 2(B)(1), Article IV, Ohio Constitution, Cleveland Bar Association v. Pleasant (1958), 167 Ohio St 325, Melling v. Stralka (1984), 12 Ohio St.3d 105,107. We overrule the respondents' motion to dismiss

for lack of jurisdiction over the person.

The subject matter of this proceeding is a five count complaint charging two Ohio attorneys with professional misconduct. It is alleged that respondents' actions amounted to charging an excessive fee and constituted conduct involving dishonesty, fraud and deceit and a refusal to pay their clients funds that were due and owing. It is also alleged in counts 4 and 5 that respondents did not cooperate in the bar association's investigation and, in fact, obstructed it by entering into a civil settlement in which the complaining party agreed to drop his disciplinary complaint and give no further information to disciplinary authorities. All these allegations, if proven by clear and convincing evidence, can demonstrate violations of the Code of Professional Responsibility. Therefore, this panel has jurisdiction over the subject matter of these proceedings. Although the underlying proceeding that is at

issue in the excessive fee count is a federal civil rights action, the Ohio Supreme Court may sanction an Ohio lawyer for misconduct that grows out of federal court action.

Therefore, the respondents' motion to dismiss on subject matter grounds is hereby overruled. The panel notes that the amount of reasonable attorney fees awarded a prevailing party in a §1983 claim is within the powers granted the U.S. District Court by Congress. The panel will weigh the evidence on the matter of an excessive fee charged Gurish guided by an assessment the district court reached on what was a reasonable fee under the circumstances. 42 USC §1988. One factor that the district court may have considered was the amount of a contingency fee agreement. Blanchard v. Bergeron, 109 S.Ct. 939, 946 (1989).

There is also pending a motion by the relator to strike material contained in the respondents' brief concerning the actions of Mr.

Wolf and Mr. Palkovitz. Although the relevance of this material is somewhat unclear at this stage of the proceeding, the relator's motion is hereby overruled. These items may relate to possible defenses or evidence showing harrassment, bad faith prosecution or possible retaliation. Therefore, at the present time, the relator's motion to strike is overruled.

This matter is now set for hearing on April 19, 1991. The respondents are ordered to file their answer to the amended complaint on or before April 10, 1991.

This entry is dated this 29th day of March 1991 and this case is continued.

/s/ Thomas G. Knoll
THOMAS G. KNOLL, CHAIRMAN

/s/ JWM
per telephone authority

THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	
Complaint against:	( ) Certified to ( )Ohio Supreme
Sanford J. Berger #0008346	( )Court on 5/7/92
AND	( )
Robert M. Fertel #0022109	( )CASE NO. 90-61
RESPONDENT,	( )
Cuyahoga County Bar Association,	( )
RELATOR.	( )

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

A hearing on this matter was held on April 19, 1991 at the offices of the Cuyahoga County Bar Association, 1228 Euclid Avenue, 370 The Halle Building, Cleveland, Ohio at 10:00 a.m. The Respondents, Sanford J. Berger and Robert M. Fertel, were present at the hearing and represented each other. Relator was represented by Lawrence A. Turbow, Esq., 24500 Chagrin Boulevard, #101, Beachwood,

Ohio; Ellen S. Mandell, 24500 Chagrin Boulevard, #101, Beachwood, Ohio; and Marshall Wolfe, Esq., 1717 East Ninth Street, Cleveland, Ohio 44114.

The Hearing Panel consisted of Charles E. Brown, Esq., Ohmer Crowell, and Thomas G. Knoll, the Panel Chairman. For purposes of the hearing, Mr. Brown presided. Pursuant to Gov. Rule V, Section 13, no member of the Panel was a resident of the District from which the Complaint originated, nor was any member of the Panel a member of the Probable Cause Panel that reviewed the matter pursuant to Section 10(b) of Gov. Rule V. The Complaint and Certificate in this matter were filed by Relator with the Board of Commissioners on Grievances and Discipline on October 4, 1990. Subsequent thereto, on January 17, 1991, the Relator filed its Amended Complaint and Certificate with the Board of Commissioners. In response to the Amended Complaint, the Respondents, on April 11,

1991, filed their Answer to the Amended Complaint.

FINDINGS OF FACT
BACKGROUND INFORMATION

1. Respondents, Sanford J. Berger and Robert M. Fertel, are attorneys, licensed to practice in the State of Ohio and in the United States District Court for the Northern District of Ohio, Eastern Division, and the United States Court of Appeals for the Sixth Circuit.

2. Relator, in its Amended Complaint, has set forth five (5) separate counts, all of which arise out of Respondents' representation of Daniel Guris ("Guris") [sic] in connection with his claim of wrongful discharge arising under 42 U.S.C. §1983.

3. Count one alleges the Respondents charged excessive attorney fees in violation of DR 2-106(A). Count two charges that the Respondents engaged in dishonesty, fraud and deceit in misrepresenting to their client the attor-

ney fee contracts that were in existence and that their conduct violated DR 1-102(A)(4). Count three charges that the Respondents withheld settlement funds from their client from March, 1989 to May 1990 in violation of DR 9-102(B). Count four charges that Respondent Fertel failed to cooperate with the Relator's investigation. Respondents are alleged in Count five to have prevented the grievant from cooperating withe the pending bar investigation through litigation in Cuyahoga County Common Pleas Court and arranging for the terms of a settlement silencing all parties in violation of DR 1-102(A)(2), (5), (6) and DR 1-103.

COUNT ONE

4. Respondents were originally consulted by Guris in December of 1984 in connection with an action captioned Daniel Guris v. Gerald McFaul, et al., Case No. 83-3 in the United States District Court for the Northern District of Ohio, Eastern Division. That lawsuit brought pursuant to 42 U.S.C. Sec. 1983, alleged that Guris had been wrongfully ter-

minated from his position as a Cuyahoga County Deputy Sheriff.

5. Prior to consulting with the Respondents, Guris had been represented in the action against McFaul by other counsel. Until contacting Respondents, Guris' action had been unsuccessful and a Summary Judgment had been granted in favor of the defendants. Berger and Fertel were retained by Guris to pursue an appeal of the trial court's decision and were ultimately successful in persuading the United States Court of Appeals for the Sixth Circuit to reverse the trial court's decision and remand the case for trial. During the pendency of the appeal, Guris advanced Respondents Five Hundred Dollars ($500.00) for fees and/or other expenses. Upon remand, the case was once again decided on summary judgment in favor of the defendants, but was again reversed in September of 1986.

6. On April 3, 1987, Guris, Berger and Fertel entered into a fee agreement entitled "Contingency Contract" in which Guris acknowledged the past services rendered by Berger and Fertel and wherein all parties acknowledged that Guris had paid Respondents the additional sum of Two Thousand Five Hundred Dollars ($2,500.00) for representation relative to the remand for trial. This amount was

not to be refundable, but was to be deducted from any award ultimately realized in the matter prior to the division of such award on the basis of 60% for Guris and 40% for Respondents.

7. Approximately one week prior to the final trial in this matter, in August of 1988, Berger and Fertel contacted Guris and as a result of that conversation, entered into a second fee contract callling for a division of any award in the matter on the basis of 50% to Respondents and 50% to Guris. Although none of the parties was able to produce a written document pertaining to the August 1988 fee contract, there seemed to be no dispute as to existence of an oral agreement in that regard. At the hearing Guris testified that at the time he entered into the second fee contract contract calling for a 50%-50% fee division, he had forgotten the existence of the prior agreement relating to a 60%-40% division; however, the Board was unconvinced that Guris was mislead in this regard.

8. Upon trial of the Guris claim against Sheriff McFaul, the Respondents were successful in securing a jury award of One Hundred Thousand Dollars ($100,000.00) in Guris' favor.

9. Following the trial, Respondents filed a

claim for Guris as the prevailing party, pursuant to 42 U.S.C. Sec. 1988, requesting attorney fees of One Hundred Ninety-One Thousand Dollars ($191,000.00) for their representation of Guris in connection with the wrongful discharge matter.

10. During the pendency of the Sec. 1988 proceedings, the issue of attorney fees was negotiated between the Respondents and the Cuyahoga County Prosecutor's Office representing the defendant Sheriff and, at the urging of Guris, was settled for the sum of Thirty Thousand Dollars ($30,000.00). Subsequent thereto, on March 13, 1989, the Cuyahoga County Commission adopted a resolution authorizing payment to Guris, Berger and Fertel in the amount of One Hundred Thousand Dollars ($100,000.00) and an additional payment of Thirty Thousand Dollars ($30,000.00) in settlement of attorney fees payable to Respondents only.

11. In due time, after adoption of the resolution by the Cuyahoga County Commission, two (2) checks were forwarded to Respondents by the Cuyahoga County Prosecutor's Office. The check for $30,000.00, made payable to Berger and Fertel, was endorsed and negotiated by them upon receipt. With respect to the check for $100,000.00, one of the Respondents con-

tacted Guris requesting he endorse the check and receive a distribution of $50,000.00, a proposal to which Guris strongly objected upon his belief that such an arrangement violated the subsequent 50/50 fee contract and would result in Respondents receiving a fee of $80,000.00 against a portion of the jury award to Guris in the amount of $50,000.00. Respondents insisted on such a fee of $80,000 and attempted to collect this fee from Guris.

COUNT TWO

12. Count Two arises out of Relator's contention that the entering into two (2) separate fee agreements with Guris and the failure to remind him that the first fee agreement was entered into, was conduct involving dishonesty, fraud, deceit and misrepresentation on the part of the Respondents. The Relator did not show by clear and convincing evidence that the Respondents engaged in fraud or deceit in getting their client to agree to a subsequent oral contract to share any recovery on a 50/50 basis. The Respondent lawyers and their client understood that the final agreement called for a 50/50 split. (Tr.p171)

COUNT THREE

13. As a result of his being unable to reach an accord with Respondents on the issue of his financial participation in the $130,000

received from the Cuahoga County Prosecutor's Office, Guris obtained new legal counsel and on June 9, 1989, filed an action for Declaratory Judgment against Berger and Fertel in the Court of Common Pleas for Cuyahoga County.

14. In response to Guris' Declaratory Judgment action, the Respondents, on June 12, 1989, filed an action against Guris and his then attorney, which action contained fourteen (14) separate counts and requested damages totalling in excess of $2.5 million dollars. All of this litigation was ultimately resolved by a settlement agreement entered inot between Guris and Respondents, the terms of which settlement remain undisclosed by virtue of the provisions Respondents caused to be drafted into the settlement Journal Entry. During the entire period from March 13,1989 through approximately May 30, 1990 (the date of settlement of the Guris v. Berger and Fertel litigation), the full amount of the award proceeds remained in Res-

pondents' possession and Guris, despite his requests, was denied access to even the undisputed portion of the funds ($50,000.00).

COUNT FOUR

15. On March 7, 1989, Guris filed a Complaint against Respondent Berger with the Certified Grievance Committee of the Cuyahoga County Bar Association.

16. On November 20, 1989, an investigatory hearing was conducted by the Certified Grievance Committee. Respondent Berger attended and was represented by Fertel.

17. As a result of that hearing, the Certified Grievance Committee filed a formal Complaint with the Board of Commissioners on Grievances and Discipline against Respondent Berger and further determined that the evidence presented implicated Respondent Fertel.

18. Subsequent thereto, an investigatory hearing was scheduled for February 8, 1990 by the Certified Grievance Committee and notice thereof was forwarded to Fertel. Despite this

notice, Respondent Fertel failed to appear at that hearing.

19. On January 23, 1990, Respondents filed a Complaint in the United States District Court for the Northern District of Ohio, Eastern Division, against the Cuyahoga County Bar Association, its President, the Certified Grievance Committee of the Cuyahoga County Bar Association; the Board of Commissioners on Grievances and Discipline, the Ohio Supreme Court and others, seeking a Temporary Restraining Order preventing further investigation by the Certified Disciplinary Committee of the Cuyahoga County Bar Association and the Board of Commissioners on Grievances and Discipline of the disciplinary charges. On January 26, 1990, the request for Temporare Restraining Order was denied. On September 19, 1991, the U.S. District Court granted the motions of the defendants (state disciplinary agencies) and the complaint was dismissed.

COUNT FIVE

20. As a part of the resolution of the litigation filed against the parties by each other, Respondents and Guris entered into, on or about May 30, 1990, a Journal Entry wherein it was agreed substantially as follows:

(a) That all litigation existing between the parties would be dismissed, with prejudice;

(b) That the Complaint filed by Guris with the Cuyahoga County Bar Association against the Respondents would be dismissed by means of correspondence prepared by Guris and approved by Respondents;

(c) That all matters pertaining to the terms of settlement would be held in strictest confidence by all parties; and

(d) That any inquiries made of the parties by any Bar Association or members of the news media would be responded to by indicating only that the matter between the parties had been resolved.

21. The evidence before the Board was clear and convincing that the language referred to in subparagraphs (b) and (d) of paragraph 20 above was included in the Journal Entry at the insistence of the Respondents.

22. In furtherance of the terms of the foregoing Journal Entry, on June 8, 1990, Guris did forward to the Certified Grievance Committee for the Cuyahoga County Bar Association correspondence requesting that the proceedings against Respondents be dismissed.

CONCLUSIONS OF LAW

23. The Board finds by clear and convincing evidence that Respondents conduct in charging and attempting to recover a fee comprised of 50% of the jury award to Guris ($50,000.00) plus the entire $30,000.00 received as a result of the settlement of the attorney fees motion in violation of DR2-106(A) [charging an excessive fee]. After reviewing the authority by both the Relator and the Respondents, the Panel concludes that the existing author-

ity with respect to 42 U.S.C. Sec. 1988 does not support Respondents' contention that the entire fee award of $30,000 was for the benefit of Respondents only, and in addition to the contracted-for fee. The effect of the settlement of Guris' federal claims resulted in a fund of $130,000 held for the benefit of the client. Venegas v. Mitchell, 110 S.Ct. 1679 (1990).

24. The Panel finds there was insufficient evidence to sustain a violation of DR1-102(A)(4) in Count Two and dismisses the same.

25. Further, the Board finds on Count Three that Respondents' conduct in failing to provide Guris with any portion of the award, even that which was undisputed, for a period in excess of one year, was in violation of DR 9-102(B)(4) [failing to pay to a client funds which the client is entitled to receive].

26. Further, the Board finds on Count Four that Respondent Fertel's failure to appear before the Certified Grievance Committee of

the Cuyahoga County Bar Association was in violation of Sec. 5(a) of Gov. Bar Rule V. The Respondents conduct in dictating terms of the Cuyahoga County Common Pleas Court Journal Entry on May 30, 1990, requiring Guris to withdraw his Complaint and further, limiting his testimony in any disciplinary proceeding was in violation of their responsibility to assist in the investigation of a Complaint and DR1-102(A)(2), (5) and (6) as charged in Count Five.

From the very onset of this matter, Respondents refused to accept any ethical responsibility for their conduct in attempting to collect their legal fees from Guris. A clearly excessive fee was charged, a client was denied access to any portion of the settlement proceeds, and when called upon to account for their conduct in an ethical investigation, the Respondents attempted to end the bar association's inquiry and silence the complainant forever. The Respondents' conduct

throughout this proceeding strikes at the heart of the disciplinary system and the rules established by the Ohio Supreme Court to ensure ethical conduct within the profession.

It is the conclusion of the Panel that by reason of Respondents' conduct as described herein, Respondents should be suspended from the practice of law within the State of Ohio for a period of one (1) year.

RECOMMENDATION

Pursuant to Gov. Bar R. V(18), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considerdd this matter on April 10, 1992. The Board adopted the Findings of Fact and Conclusions of Law of the Panel and recommends that the Respondents, Sanford J. Berger and Robert M. Fertel, be suspended for one (1) year from the practice of law in the State of Ohio. The Board further recommends that the costs of these proceedings be taxed to the Respondent in any

disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Greivances and Dsicipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

/s/ Jonathan W. Marshall
JONATHAN W. Marshall, Secretary
Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

The Supreme Court of Ohio

Cuyahoga County Bar Association Relator, v. Sanford J. Berger, Robert M. Fertel, Respondents	() () () () () () () () () ()	1992 Term To wit: June 24, 1992 Case No. 92-905 Case No. 92-906 ENTRY

Upon consideration of respondent's motion to abstain or, in the alternative, for extension of time to file objections and a brief,

IT IS ORDERED by the Court that said motion be, and the same is hereby, denied.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

Cuyahoga County Bar Association, Relator	( )	1992 Term
	( )	To wit: July 30, 1992
v.	( )	Case No. 92-905
	( )	Case No. 92-906
Sanford J. Berger Robert M. Fertel, Respondents	( )	ENTRY

Upon consideration of respondent's motion to file objections instanter,

IT IS ORDERED by the Court that said motion be, and the same is hereby, denied.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

CUYAHOGA COUNTY BAR ASSOCIATION v. BERGER

CUYAHOGA COUNTY BAR ASSOCIATION v. FERTEL

[Cite as Cuyahoga Cty. Bar Assn. v. Berger (1992), 64 Ohio St.3d 454]

Attorneys at law--Misconduct--One year suspension--Charging a clearly excessive fee--Refusing to promptly pay funds to a client which client is entitled to receive--Neglecting or refusing to assist the grievance committee's investigation--Circumventing a disciplinary Rule through actions of another--Engaging in conduct prejudicial to the administration of justice--Engaging in conduct adversely reflecting on one's fitness to practice law.

(Nos. 92-905 and 92-906--Submitted June 17, 1992--Decided September 2, 1992.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court. No. 90-61.

By amended complaint filed January 17, 1991, relator Cuyahoga County Bar Association charged respondents, Sanford J. Berger (Attorney Registration No. 0008346) and Robert M. Fertel (Attorney Registration No. 0022109) with misconduct, in five counts: violations of DR2-106(A) (charging a clearly excessive fee); 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 9-102(B)(4) (refusing to

promptly pay funds to a client which client is entitled to receive); Gov.Bar R. V(5)(a) (neglecting or refusing to assist the grievance committee's investigation); DR1-102(A)(2), (5), (6) and 1-103(A) (circumventing a Disciplinary Rule through actions of another; engaging in conduct prejudicial to the administration of justice; engaging in conduct adversely reflecting on one's fitness to practice law; and failing to report unprivileged knowledge of a violation of DR 1-102 to a tribunal or other investigative authority).

Respondents' answer to the amended complaint, filed April 11, 1991, denied the allegations of misconduct and raised affirmative defenses. Respondents alleged that the board lacked subject-matter jurisdiction and that the charges were not proper because of federal preemption and the Supremacy Clause of Clause 2, Article VI of the United States Constitution.

Testimony and other evidence was presented

at a hearing before a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court. The record reflects that the charges of misconduct arose from respondents' representation of Daniel Gurish in connection with his claim for wrongful discharge as a Cuyahoga County deputy sheriff arising under Section 1988, Title 42, U.S. Code. Respondents obtained a judgment in favor of Gurish and against Cuyahoga County Sheriff McFaul in the amount of $100,000. Thereafter, pursuant to Section 1988, Title 42, U.S.Code, the court awarded $30,000 as reasonable attorney fees. At Gurish's urging, respondents accepted a total settlement "package" of $130,000.

The Board of Commissioners of Cuyahoga County authorized preparation of a voucher payable to Gurish, Berger and Fertel for $100,000 and an additional voucher payable to only Berger and Fertel for $30,000. These checks were delivered to respondents and the

$30,000 check was cashed by respondents. A disagreement resulted over the division of the $100,000 check. Respondents contended they were entitled to the $30,000 in attorney fees and, in addition, fifty percent of the $100,000 award, based upon a contingency fee agreement between the parties. Gurish wanted fifty percent of the $130,000 "package." As a result of the dispute, Gurish filed an action in the Court of Common Pleas of Cuyahoga County for declaratory judgment as to the proper division of the $100,000 check. Respondents filed a separate action seeking damages against Gurish and his new attorney in the amount of $2,500,000.

The two actions were settled on May 30, 1990, on the basis of a split of the $130,000 package, with Gurish receiving $65,000 and respondents receiving $35,000 (in addition to the $30,000 attorney-fee check). The agreement required strict confidentiality as to the terms of the settlement and, in the event

of inquiries by any bar association, an agreement that the response would be limited to: "the matters have been resolved."

The hearing panel reviewed the complaint against respondents and made findings of fact, conclusions of law and a recommendation. Asserting that the respondents' conduct struck at the heart of the disciplinary system and ethical rules established by the Ohio Supreme Court, the panel noted that respondents refused to accept any ethical responsibility for their conduct.

Moreover, the panel concluded that respondents charged an excessive fee, denied a client access to settlement proceeds, and attempted to suppress the bar association's investigation, thus violating DR2-106(A), 9-102(B)(4), Gov. Bar R. V(5)(a) and DR 1-102 (A)(2), (5), and (6). However, the panel found no violation of DR 1-102(A)(4).

The panel recommended that respondents be suspended from the practice of law for one

year. The board adopted the findings, conclusions and recommendations of the panel and further recommended that costs be taxed to respondents.

Laurence A. Turbow, Ellen S. Mandell and Marshall J. Wolf, for relator.

Sanford J. Berger, for respondent Robert M. Fertel.

Robert M. Fertel, for respondent Sanford J. Berger.

Per curiam. Based upon review of the record, including the exhibits, we concur in the findings and recommendations of the board. Respondents, Sanford J. Berger and Robert M. Fertel, are each hereby suspended from the practice of law in Ohio for one year. Costs taxed to respondents.

Judgment accordingly.

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT, H. BROWN and RESNICK, JJ., concur.

UNITED STATES CONSTITUTION

Supremacy Clause, Article VI, Clause 2,

This Constitution and the Laws of the United States which shall be made in pursuance thereof; ..., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1988
(in pertinent part)

In any action or proceeding to enforce a provision of sections ... 1981 of the Revised Statutes [42 USCS §§1981-1983, 1985, 1986], ... or title VI of the Civil Rights Act of 1964 [42 USCS §§1681 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

DR2-106 of OHIO SUPREME COURT'S
CODE OF PROFESSIONAL RESPONSIBILITY

DR2-106. FEES FOR LEGAL SERVICES

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or pawyers performing the services.

(8) Whether the fee is fixed or contingent.

DR9-102(B)(4) of OHIO SUPREME COURT'S CODE OF PROFESSIONAL RESPONSIBILITY

DR9-102(B) A lawyer shall:

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Supreme Court, U.S.
FILED
DEC 22 1992
OFFICE OF THE CLERK

NO. 92-887

IN THE SUPREME COURT OF THE UNITED STATES
1992 TERM

SANFORD J. BERGER, et al.

Petitioners

- vs -

CUYAHOGA COUNTY BAR ASSOCIATION

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To The Supreme Court of Ohio

ATTORNEYS FOR PETITIONERS

Sanford J. Berger
Robert M. Fertel
BERGER & FERTEL
1836 Euclid Avenue
Room 305
Cleveland, Ohio
44115-2234
216-781-5950

ATTORNEY FOR RESPONDENT

Ellen S. Mandell
TURBOW, MONASTRA & MANDELL
75 Public Square
Suite 700
Cleveland, Ohio
44113-2001
216-771-4900

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ISSUE PRESENTED

I. Whether an attorney licensed to practice law in Ohio is subject to sanction by The Supreme Court of Ohio for conduct determined to violate the Ohio Code of Professional Responsibility and the Rules for the Government of the Bar.

STATEMENT OF THE CASE

By Amended Complaint filed January 17, 1991, (A32-A46) respondent Cuyahoga County Bar Association, through a trial committee of its Certified Grievance Committee, charged petitioners Sanford Berger and Robert Fertel with misconduct which constituted violations of Ohio's Code of Professional Responsibility and The Ohio Supreme Court's Rules for the Government of the Bar. (A24-28) and (A30-A31).

Attorneys Berger and Fertel filed an Answer to the Amended Complaint on April 11, 1991, denying the allegations. Consequently, a hearing on the Amended Complaint was conducted before a panel of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio.

The panel of the Board of Commissioners on Grievances and Discipline

of The Supreme Court of Ohio ultimately issued Findings of Fact, Conclusions of Law and a Recommendation. (A1-A17). That panel concluded that Berger and Fertel had committed most of the misconduct alleged and recommended that the attorneys be suspended from the practice of law in Ohio for a period of one year. The full Board of Commissioners on Grievances and Discipline adopted the Findings, Conclusions and Recommendation of the panel.

By opinion and order dated September 2, 1992, 64 Ohio St. 3d 454, 597 N.E. 2d 81, (A18-A23), the Ohio Supreme Court, concurring in the Finding and Recommendations of the Board of Commissioners on Grievances and Discipline, suspended both Berger and Fertel from the practice of law in Ohio for a period of one year and assessed the costs of the action against them.

Subsequently, on October 27, 1992, Berger and Fertel sought a stay of the imposition of their suspensions. On November 12, 1992, The Ohio Supreme Court denied the Motion for Stay.[1] On November 23, 1992, the present Petition for a Writ of Certiorari was filed by petitioners Berger and Fertel.

STATEMENT OF THE FACTS

Sanford Berger and Robert Fertel are attorneys, licensed to practice law in the State of Ohio, maintaining offices in Cleveland, Ohio.

In December, 1984, Daniel Gurish consulted with petitioners Sanford Berger and Robert Fertel regarding an appeal Gurish wished to pursue from an adverse summary judgment ruling in a lawsuit

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[1]The petitioners also filed an Application for Stay with Justice Stevens of the United States Supreme Court on October 19, 1992. Respondents are unaware of any action or ruling on that Application.

brought by him pursuant to 42 U.S.C. 1983. Berger and Fertel successfully appealed that adverse decision. On remand, the case was again disposed of on summary judgment and Berger and Fertel successfully appealed. Counsel requested and were paid Five Hundred Dollars ($500.00) for the appeals, and Two Thousand Five Hundred Dollars ($2,500.00) as a retainer on the second remand trial.

On April 3, 1987, Gurish, Berger and Fertel entered into a fee agreement in which counsel's past services were acknowledged; also acknowledged was Gurish's payment of Two Thousand Five Hundred Dollars ($2,500.00), which sum "is not refundable, but [which] sum shall first be deducted from any sums realized prior to the 60% [to Gurish] - 40% [to counsel] split."

The case was set for trial in August, 1988. Approximately one week prior to

trial, Berger and Fertel advised Gurish that no fee agreement had been entered into by the parties and demanded that such an agreement be completed prior to trial. Having forgotten about the April 3, 1987 contract, Gurish signed a new contingent fee contract calling for a 50% counsel fee and not providing for credit for the monies advanced by Gurish.

The trial resulted in a jury verdict in Gurish's favor in the amount of One Hundred Thousand Dollars ($100,000.00). Subsequently, a motion for attorney fees filed pursuant to 42 U.S.C. 1988 was compromised and settled for Thirty Thousand Dollars ($30,000.00). The trial court, at the insistence of Berger and Fertel, did not make a finding as to reasonable attorney fees, but, rather, disposed of the motion as "settled and dismissed."

On March 13, 1989, two checks were issued by the defendant in payment of the

judgment in favor of Gurish and the compromise settlement of the attorney fees. A check in the amount of One Hundred Thousand Dollars ($100,000.00) was issued payable to Gurish, Berger and Fertel; a check in the amount of Thirty Thousand Dollars ($30,000.00) was issued payable to Berger and Fertel only. The check for Thirty Thousand Dollars ($30,000.00) was endorsed and negotiated by Berger and Fertel. Relative to the check which represented the jury award, Berger contacted Gurish by telephone and requested a meeting at which Gurish would endorse the award check and receive Fifty Thousand Dollars ($50,000.00). Gurish refused to endorse the check, claiming he was entitled to receive one-half of the jury award plus reimbursement of attorney fees totaling Thirty Thousand Dollars ($30,000.00), the compromise amount. Berger and Fertel claimed they were entitled to one-half the

jury award plus all of the attorney fee settlement, totaling Eighty Thousand Dollars ($80,000.00).

At some point in time, Gurish suggested that Berger and Fertel agree to distribute Fifty Thousand Dollars ($50,000.00) to him, representing the "undisputed" amount due him, and place the remaining funds in escrow. The attorneys refused and simply maintained possession of the unendorsed check.

On March 7, 1989, Gurish filed a complaint against Berger with the Certified Grievance Committee of the Cuyahoga County Bar Association ("Grievance Committee"). In addition, on June 9, 1989, Gurish filed an action for declaratory judgment against Berger and Fertel in the Court of Common Pleas for Cuyahoga County, seeking a declaration of his rights under the fee contract.

On June 12, 1989, Berger and Fertel

filed a multi-count complaint and "supplemental" complaint against Gurish and his attorney alleging, inter alia, that the filing of the complaint with the Certified Grievance Committee of the Cuyahoga County Bar Association constituted an invasion of privacy and interference with contractual right

The Grievance Committee conducted an investigatory hearing on November 20, 1989, at which Berger appeared, represented by Fertel. At the close of testimony, the Grievance Committee voted to proceed with a formal complaint against Berger before the Board of Commissioners on Grievances and Discipline. It was also determined that Fertel's conduct should be investigated at a formal hearing. Fertel failed to appear at that subsequently scheduled investigatory hearing.

Following a trial before a panel of the Board of Commissioners on Grievance and

Discipline, the allegations contained in Counts One, Three, Four and Five were found to have been proven. Ultimately, The Ohio Supreme Court adopted those findings and Berger and Fertel were suspended from the practice of law in Ohio for one year. (A22-A23).

ARGUMENT AND LAW

ISSUE I

Whether an attorney licensed to practice law in Ohio is subject to sanction by The Ohio Supreme Court of Ohio for conduct determined to violate the Ohio Code of Professional Responsibility of the Bar.

Petitioners are seeking intervention by this Court in a matter which is and should be exclusively within the province of The Ohio Supreme Court. The issues are clear and straight forward, despite petitioners' attempts to obfuscate and mischaracterize what has occurred.

Based on principles of comity and federalism, the doctrine of abstention articulated by this Court in Younger v. Harris, 401 U.S. 37 (1971) is equally applicable to the proceedings at issue in this case. While petitioners are not here seeking injunctive relief, but rather are seeking to overturn state disciplinary proceedings and actions which have already taken place, the Younger rationale

reflecting a policy against federal intervention still holds merit. This Court and the lower Federal courts have consistently held that federal intervention in state disciplinary matters is inappropriate. See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982); Hefner v. Alexander, 779 F.2d 277 (5th Cir. 1985); Director of Lawyers Professional Responsibility Bd. v. Perl, 752 F.2d 352 (8th Cir. 1985); Rosenthal v. Carr, 614 F.2d 1219 (9th Cir.), cert. denied, 447 U.S. 927 (1980); Gipson v. New Jersey Supreme Court, 558 F.2d 701 (3rd Cir. 1977); Erdmann v. Stevens, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972).

The Middlesex Court explicitly recognized that states have an "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." Middlesex, 457

U.S. at 434. In Gipson, the Court noted that "incursions by Federal courts into ongoing disciplinary proceedings would be peculiarly disruptive." Gipson, 558 F.2d at 704.

By state constitutional provision, The Ohio Supreme Court is expressly vested with the authority and jurisdiction to regulate all matters relating to the practice of law in the state, including the discipline of persons admitted to such practice. Ohio Const. Art. IV, Section 2(B)(1)(g). (A29). Pursuant to this authorization and its inherent power to discipline attorneys practicing under its license, the Court has promulgated rules for the governance of the Ohio Bar, establishing the authority of Bar committees to investigate and prosecute complaints against attorneys licensed in Ohio. Supreme Court Gov.R.V(5)(a). (A30-A31). See, Cleveland Bar Ass'n. v. Pleasant, 167 Ohio St. 325,334-36 (1958).

Petitioners do not suggest that the constitutional authority of The Ohio Supreme Court to discipline Ohio-licensed attorneys is invalid or violative of federal constitutional protections. Petitioners do not suggest that the rules established by The Ohio Supreme Court for the governance of Ohio-licensed attorneys are constitutionally impaired. Nor do petitioners suggest that they were denied their due process rights by the proceedings which ocurred under those governance rules. See, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

What petitioners do assert is that their conduct is immune from The Ohio Supreme Court's scrutiny because the alleged misconduct occurred in Federal court proceedings. That assertion is both legally and factually incorrect. It is legally incorrect because the Federal courts have recognized the interest of the

state in regulating the conduct of attorneys it licenses. It is factually incorrect because the sanctioned conduct did not occur in Federal court proceedings.

In the first count of the complaint against them, Berger and Fertel were charged with taking an excessive fee based upon their fee agreement with Gurish. That fee agreement, entered into in Ohio and governed by Ohio law, called for petitioners to render legal services to Gurish in exchange for 50% of the recovery or award. Berger and Fertel attempted to retain Eighty Thousand Dollars ($80,000.00) of a total pool of One Hundred Thirty Thousand Dollars ($130,000.00). By their own insistence, Berger and Fertel precluded the Federal court from awarding attorney fees and from adopting the settled upon sum as its own finding of reasonable fees. The Federal court never made any finding regarding the fee or how the fee agreement

should be interpreted. Thus, on Court One, the discipline invoked did not involve scrutiny by The Ohio Supreme Court of a Federal court fee award under 42 U.S.C. Section 1988.

In Court Three, Berger and Fertel were found to have violated the Disciplinary Rule regarding prompt distribution of client funds. Once again, the allegations did not involve any Federal court action or conduct, but rather related to a fee agreement governed by Ohio law and the failure to distribute the "undisputed" amount to petitioners' client.

In Court Four, the allegation against Fertel for failure to cooperate with the Grievance Committee's investigation relates only to The Ohio Supreme Court's Gov.R.V(5)(a). The heart of The Ohio Supreme Court's inherent power to govern attorney conduct is its ability to investigate allegations of wrongdoing and

to compel cooperation in those investigations. Disciplinary Counsel v. Liebold, 53 Ohio St. 3d 128 (1990); Cleveland Bar Association v. Keane, 20 Ohio St. 3d 11 (1985).

Without question, the allegations contained in Court Five of the complaint related to state court activity and conduct by Berger and Fertel. In a state court proceeding, petitioners caused a settlement premised and conditioned upon Gurish's dismissal of his complaint before the Cuyahoga County Bar Association's Certified Grievance Committee and the further agreement of Gurish that he would not testify at the trial on that grievance. As the Board of Commissioners specifically found, that conduct was intended to stymie the disciplinary process and protect the petitioners from having to answer the charges against them.

The discipline imposed upon

petitioners is based upon their conduct as attorneys licensed to practice by The Ohio Supreme Court; the discipline does not derive from any conduct of the petitioners in Federal court proceedings. The charges resulted from conduct over which the Federal court had no supervision or control.

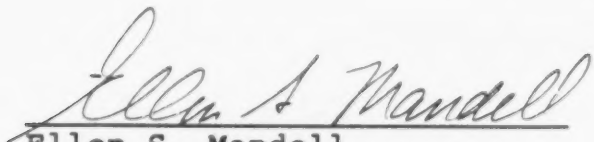
CONCLUSION

Petitioners raise no legitimate Federal constitutional questions. The issues presented by petitioners are the product of "smoke and mirrors" and bear no factual or legal relationship to the state proceedings below.

Having been afforded all due process rights in the state proceedings and, further, having no basis for asserting any constitutional infirmity in Ohio's disciplinary scheme, the petitioners are not entitled to review of their suspensions

from state legal practice by this Honorable Court.

Respectfully submitted,



Ellen S. Mandell
Attorney for Respondent
TURBOW, MONASTRA & MANDELL
75 Public Square, Suite 700
Cleveland, Ohio 44113-2001
216-771-4900

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari to The Supreme Court of Ohio was forwarded this 23rd day of December, 1992 to Sanford J. Berger and Robert M. Fertel, Berger & Fertel, 1836 Euclid Avenue, Room 305, Cleveland, Ohio 44115-2234.

Ellen S. Mandell
Attorney for Respondent

APPENDIX

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THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	( ) Certified to
Complaint against:	( )Ohio Supreme
Sanford J. Berger #0008346	( )Court on 5/7/92
AND	( )
Robert M. Fertel #0022109	( )CASE NO. 90-61
RESPONDENT,	( )
Cuyahoga County Bar Association,	( )
RELATOR.	( )

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

A hearing on this matter was held on April 19, 1991 at the offices of the Cuyahoga County Bar Association, 1228 Euclid Avenue, 370 The Halle Building, Cleveland, Ohio at 10:00 a.m. The Respondents, Sanford J. Berger and Robert M. Fertel, were present at the hearing and represented each other. Relator was represented by Lawrence A. Turbow, Esq., 24500 Chagrin Boulevard, #101, Beachwood,

Ohio; Ellen S. Mandell, 24500 Chagrin Boulevard, #101, Beachwood, Ohio; and Marshall Wolfe, Esq., 1717 East Ninth Street, Cleveland, Ohio 44114.

The Hearing Panel consisted of Charles E. Brown, Esq., Ohmer Crowell, and Thomas G. Knoll, the Panel Chairman. For purposes of the hearing, Mr. Brown presided. Pursuant to Gov. Rule V, Section 13, no member of the Panel was a resident of the District from which the Complaint originated, nor was any member of the Panel a member of the Probable Cause Panel that reviewed the matter pursuant to Section 10(b) of Gov. Rule V. The Complaint and Certificate in this matter were filed by Relator with the Board of Commissioners on Grievances and Discipline on October 4, 1990. Subsequent thereto, on January 17, 1991, the Relator filed its Amended Complaint and Certificate with the Board of Commissioners. In response to the Amended Complaint, the Respondents, on April 11,

1991, filed their Answer to the Amended Complaint.

FINDINGS OF FACT
BACKGROUND INFORMATION

1. Respondents, Sanford J. Berger and Robert M. Fertel, are attorneys, licensed to practice in the State of Ohio and in the United States District Court for the Northern District of Ohio, Eastern Division, and the United States Court of Appeals for the Sixth Circuit.

2. Relator, in its Amended Complaint, has set forth five (5) separate counts, all of which arise out of Respondents' representation of Daniel Guris ("Guris") [sic] in connection with his claim of wrongful discharge arising under 42 U.S.C. §1983.

3. Count one alleges the Respondents charged excessive attorney fees in violation of DR 2-106(A). Count two charges that the Respondents engaged in dishonesty, fraud and deceit in misrepresenting to their client the attor-

ney fee contracts that were in existence and that their conduct violated DR 1-102(A)(4). Count three charges that the Respondents withheld settlement funds from their client from March, 1989 to May 1990 in violation of DR 9-102(B). Count four charges that Respondent Fertel failed to cooperate with the Relator's investigation. Respondents are alleged in Count five to have prevented the grievant from cooperating withe the pending bar investigation through litigation in Cuyahoga County Common Pleas Court and arranging for the terms of a settlement silencing all parties in violation of DR 1-102(A)(2), (5), (6) and DR 1-103.

COUNT ONE

4. Respondents were originally consulted by Guris in December of 1984 in connection with an action captioned Daniel Guris v. Gerald McFaul, et al., Case No. 83-3 in the United States District Court for the Northern District of Ohio, Eastern Division. That lawsuit brought pursuant to 42 U.S.C. Sec. 1983, alleged that Guris had been wrongfully ter-

minated from his position as a Cuyahoga County Deputy Sheriff.

5. Prior to consulting with the Respondents, Guris had been represented in the action against McFaul by other counsel. Until contacting Respondents, Guris' action had been unsuccessful and a Summary Judgment had been granted in favor of the defendants. Berger and Fertel were retained by Guris to pursue an appeal of the trial court's decision and were ultimately successful in persuading the United States Court of Appeals for the Sixth Circuit to reverse the trial court's decision and remand the case for trial. During the pendency of the appeal, Guris advanced Respondents Five Hundred Dollars ($500.00) for fees and/or other expenses. Upon remand, the case was once again decided on summary judgment in favor of the defendants, but was again reversed in September of 1986.

6. On April 3, 1987, Guris, Berger and Fertel entered into a fee agreement entitled "Contingency Contract" in which Guris acknowledged the past services rendered by Berger and Fertel and wherein all parties acknowledged that Guris had paid Respondents the additional sum of Two Thousand Five Hundred Dollars ($2,500.00) for representation relative to the remand for trial. This amount was

not to be refundable, but was to be deducted from any award ultimately realized in the matter prior to the division of such award on the basis of 60% for Guris and 40% for Respondents.

7. Approximately one week prior to the final trial in this matter, in August of 1988, Berger and Fertel contacted Guris and as a result of that conversation, entered into a second fee contract callling for a division of any award in the matter on the basis of 50% to Respondents and 50% to Guris. Although none of the parties was able to produce a written document pertaining to the August 1988 fee contract, there seemed to be no dispute as to existence of an oral agreement in that regard. At the hearing Guris testified that at the time he entered into the second fee contract contract calling for a 50%-50% fee division, he had forgotten the existence of the prior agreement relating to a 60%-40% division; however, the Board was unconvinced that Guris was mislead in this regard.

8. Upon trial of the Guris claim against Sheriff McFaul, the Respondents were successful in securing a jury award of One Hundred Thousand Dollars ($100,000.00) in Guris' favor.

9. Following the trial, Respondents filed a

claim for Guris as the prevailing party, pursuant to 42 U.S.C. Sec. 1988, requesting attorney fees of One Hundred Ninety-One Thousand Dollars ($191,000.00) for their representation of Guris in connection with the wrongful discharge matter.

10. During the pendency of the Sec. 1988 proceedings, the issue of attorney fees was negotiated between the Respondents and the Cuyahoga County Prosecutor's Office representing the defendant Sheriff and, at the urging of Guris, was settled for the sum of Thirty Thousand Dollars ($30,000.00). Subsequent thereto, on March 13, 1989, the Cuyahoga County Commission adopted a resolution authorizing payment to Guris, Berger and Fertel in the amount of One Hundred Thousand Dollars ($100,000.00) and an additional payment of Thirty Thousand Dollars ($30,000.00) in settlement of attorney fees payable to Respondents only.

11. In due time, after adoption of the resolution by the Cuyahoga County Commission, two (2) checks were forwarded to Respondents by the Cuyahoga County Prosecutor's Office. The check for $30,000.00, made payable to Berger and Fertel, was endorsed and negotiated by them upon receipt. With respect to the check for $100,000.00, one of the Respondents con-

tacted Guris requesting he endorse the check and receive a distribution of $50,000.00, a proposal to which Guris strongly objected upon his belief that such an arrangement violated the subsequent 50/50 fee contract and would result in Respondents receiving a fee of $80,000.00 against a portion of the jury award to Guris in the amount of $50,000.00. Respondents insisted on such a fee of $80,000 and attempted to collect this fee from Guris.

COUNT TWO

12. Count Two arises out of Relator's contention that the entering into two (2) separate fee agreements with Guris and the failure to remind him that the first fee agreement was entered into, was conduct involving dishonesty, fraud, deceit and misrepresentation on the part of the Respondents. The Relator did not show by clear and convincing evidence that the Respondents engaged in fraud or deceit in getting their client to agree to a subsequent oral contract to share any recovery on a 50/50 basis. The Respondent lawyers and their client understood that the final agreement called for a 50/50 split. (Tr.p171)

COUNT THREE

13. As a result of his being unable to reach an accord with Respondents on the issue of his financial participation in the $130,000

received from the Cuahoga County Prosecutor's Office, Guris obtained new legal counsel and on June 9, 1989, filed an action for Declaratory Judgment against Berger and Fertel in the Court of Common Pleas for Cuyahoga County.

14. In response to Guris' Declaratory Judgment action, the Respondents, on June 12, 1989, filed an action against Guris and his then attorney, which action contained fourteen (14) separate counts and requested damages totalling in excess of $2.5 million dollars. All of this litigation was ultimately resolved by a settlement agreement entered inot between Guris and Respondents, the terms of which settlement remain undisclosed by virtue of the provisions Respondents caused to be drafted into the settlement Journal Entry. During the entire period from March 13,1989 through approximately May 30, 1990 (the date of settlement of the Guris v. Berger and Fertel litigation), the full amount of the award proceeds remained in Res-

pondents' possession and Guris, despite his requests, was denied access to even the undisputed portion of the funds ($50,000.00).

COUNT FOUR

15. On March 7, 1989, Guris filed a Complaint against Respondent Berger with the Certified Grievance Committee of the Cuyahoga County Bar Association.

16. On November 20, 1989, an investigatory hearing was conducted by the Certified Grievance Committee. Respondent Berger attended and was represented by Fertel.

17. As a result of that hearing, the Certified Grievance Committee filed a formal Complaint with the Board of Commissioners on Grievances and Discipline against Respondent Berger and further determined that the evidence presented implicated Respondent Fertel.

18. Subsequent thereto, an investigatory hearing was scheduled for February 8, 1990 by the Certified Grievance Committee and notice thereof was forwarded to Fertel. Despite this

notice, Respondent Fertel failed to appear at that hearing.

19. On January 23, 1990, Respondents filed a Complaint in the United States District Court for the Northern District of Ohio, Eastern Division, against the Cuyahoga County Bar Association, its President, the Certified Grievance Committee of the Cuyahoga County Bar Association; the Board of Commissioners on Grievances and Discipline, the Ohio Supreme Court and others, seeking a Temporary Restraining Order preventing further investigation by the Certified Disciplinary Committee of the Cuyahoga County Bar Association and the Board of Commissioners on Grievances and Discipline of the disciplinary charges. On January 26, 1990, the request for Temporare Restraining Order was denied. On September 19, 1991, the U.S. District Court granted the motions of the defendants (state disciplinary agencies) and the complaint was dismissed.

COUNT FIVE

20. As a part of the resolution of the litigation filed against the parties by each other, Respondents and Guris entered into, on or about May 30, 1990, a Journal Entry wherein it was agreed substantially as follows:

(a) That all litigation existing between the parties would be dismissed, with prejudice;

(b) That the Complaint filed by Guris with the Cuyahoga County Bar Association against the Respondents would be dismissed by means of correspondence prepared by Guris and approved by Respondents;

(c) That all matters pertaining to the terms of settlement would be held in strictest confidence by all parties; and

(d) That any inquiries made of the parties by any Bar Association or members of the news media would be responded to by indicating only that the matter between the parties had been resolved.

21. The evidence before the Board was clear and convincing that the language referred to in subparagraphs (b) and (d) of paragraph 20 above was included in the Journal Entry at the insistence of the Respondents.

22. In furtherance of the terms of the foregoing Journal Entry, on June 8, 1990, Guris did forward to the Certified Grievance Committee for the Cuyahoga County Bar Association correspondence requesting that the proceedings against Respondents be dismissed.

CONCLUSIONS OF LAW

23. The Board finds by clear and convincing evidence that Respondents conduct in charging and attempting to recover a fee comprised of 50% of the jury award to Guris ($50,000.00) plus the entire $30,000.00 received as a result of the settlement of the attorney fees motion in violation of DR2-106(A) [charging an excessive fee]. After reviewing the authority by both the Relator and the Respondents, the Panel concludes that the existing author-

ity with respect to 42 U.S.C. Sec. 1988 does not support Respondents' contention that the entire fee award of $30,000 was for the benefit of Respondents only, and in addition to the contracted-for fee. The effect of the settlement of Guris' federal claims resulted in a fund of $130,000 held for the benefit of the client. Venegas v. Mitchell, 110 S.Ct. 1679 (1990).

24. The Panel finds there was insufficient evidence to sustain a violation of DR1-102(A)(4) in Count Two and dismisses the same.

25. Further, the Board finds on Count Three that Respondents' conduct in failing to provide Guris with any portion of the award, even that which was undisputed, for a period in excess of one year, was in violation of DR 9-102(B)(4) [failing to pay to a client funds which the client is entitled to receive].

26. Further, the Board finds on Count Four that Respondent Fertel's failure to appear before the Certified Grievance Committee of

the Cuyahoga County Bar Association was in violation of Sec. 5(a) of Gov. Bar Rule V. The Respondents conduct in dictating terms of the Cuyahoga County Common Pleas Court Journal Entry on May 30, 1990, requiring Guris to withdraw his Complaint and further, limiting his testimony in any disciplinary proceeding was in violation of their responsibility to assist in the investigation of a Complaint and DR1-102(A)(2), (5) and (6) as charged in Count Five.

From the very onset of this matter, Respondents refused to accept any ethical responsibility for their conduct in attempting to collect their legal fees from Guris. A clearly excessive fee was charged, a client was denied access to any portion of the settlement proceeds, and when called upon to account for their conduct in an ethical investigation, the Respondents attempted to end the bar association's inquiry and silence the complainant forever. The Respondents' conduct

throughout this proceeding strikes at the heart of the disciplinary system and the rules established by the Ohio Supreme Court to ensure ethical conduct within the profession.

It is the conclusion of the Panel that by reason of Respondents' conduct as described herein, Respondents should be suspended from the practice of law within the State of Ohio for a period of one (1) year.

RECOMMENDATION

Pursuant to Gov. Bar R. V(18), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considerdd this matter on April 10, 1992. The Board adopted the Findings of Fact and Conclusions of Law of the Panel and recommends that the Respondents, Sanford J. Berger and Robert M. Fertel, be suspended for one (1) year from the practice of law in the State of Ohio. The Board further recommends that the costs of these proceedings be taxed to the Respondent in any

disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Greivances and Dsicipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

/s/ Jonathan W. Marshall
JONATHAN W. Marshall, Secretary
Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

CUYAHOGA COUNTY BAR ASSOCIATION v. BERGER

CUYAHOGA COUNTY BAR ASSOCIATION v. FERTEL

[Cite as Cuyahoga Cty. Bar Assn. v. Berger (1992), 64 Ohio St.3d 454]

Attorneys at law--Misconduct--One year suspension--Charging a clearly excessive fee--Refusing to promptly pay funds to a client which client is entitled to receive--Neglecting or refusing to assist the grievance committee's investigation--Circumventing a disciplinary Rule through actions of another--Engaging in conduct prejudicial to the administration of justice--Engaging in conduct adversely reflecting on one's fitness to practice law.

(Nos. 92-905 and 92-906--Submitted June 17, 1992--Decided September 2, 1992.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court. No. 90-61.

By amended complaint filed January 17, 1991, relator Cuyahoga County Bar Association charged respondents, Sanford J. Berger (Attorney Registration No. 0008346) and Robert M. Fertel (Attorney Registration No. 0022109) with misconduct, in five counts: violations of DR2-106(A) (charging a clearly excessive fee); 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 9-102(B)(4) (refusing to

promptly pay funds to a client which client is entitled to receive); Gov.Bar R. V(5)(a) (neglecting or refusing to assist the grievance committee's investigation); DR1-102(A)(2), (5), (6) and 1-103(A) (circumventing a Disciplinary Rule through actions of another; engaging in conduct prejudicial to the administration of justice; engaging in conduct adversely reflecting on one's fitness to practice law; and failing to report unprivileged knowledge of a violation of DR 1-102 to a tribunal or other investigative authority).

Respondents' answer to the amended complaint, filed April 11, 1991, denied the allegations of misconduct and raised affirmative defenses. Respondents alleged that the board lacked subject-matter jurisdiction and that the charges were not proper because of federal preemption and the Supremacy Clause of Clause 2, Article VI of the United States Constitution.

Testimony and other evidence was presented

at a hearing before a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court. The record reflects that the charges of misconduct arose from respondents' representation of Daniel Gurish in connection with his claim for wrongful discharge as a Cuyahoga County deputy sheriff arising under Section 1988, Title 42, U.S. Code. Respondents obtained a judgment in favor of Gurish and against Cuyahoga County Sheriff McFaul in the amount of $100,000. Thereafter, pursuant to Section 1988, Title 42, U.S.Code, the court awarded $30,000 as reasonable attorney fees. At Gurish's urging, respondents accepted a total settlement "package" of $130,000.

The Board of Commissioners of Cuyahoga County authorized preparation of a voucher payable to Gurish, Berger and Fertel for $100,000 and an additional voucher payable to only Berger and Fertel for $30,000. These checks were delivered to respondents and the

$30,000 check was cashed by respondents. A disagreement resulted over the division of the $100,000 check. Respondents contended they were entitled to the $30,000 in attorney fees and, in addition, fifty percent of the $100,000 award, based upon a contingency fee agreement between the parties. Gurish wanted fifty percent of the $130,000 "package." As a result of the dispute, Gurish filed an action in the Court of Common Pleas of Cuyahoga County for declaratory judgment as to the proper division of the $100,000 check. Respondents filed a separate action seeking damages against Gurish and his new attorney in the amount of $2,500,000.

The two actions were settled on May 30, 1990, on the basis of a split of the $130,000 package, with Gurish receiving $65,000 and respondents receiving $35,000 (in addition to the $30,000 attorney-fee check). The agreement required strict confidentiality as to the terms of the settlement and, in the event

of inquiries by any bar association, an agreement that the response would be limited to: "the matters have been resolved."

The hearing panel reviewed the complaint against respondents and made findings of fact, conclusions of law and a recommendation. Asserting that the respondents' conduct struck at the heart of the disciplinary system and ethical rules established by the Ohio Supreme Court, the panel noted that respondents refused to accept any ethical responsibility for their conduct.

Moreover, the panel concluded that respondents charged an excessive fee, denied a client access to settlement proceeds, and attempted to suppress the bar association's investigation, thus violating DR2-106(A), 9-102(B)(4), Gov. Bar R. V(5)(a) and DR 1-102 (A)(2), (5), and (6). However, the panel found no violation of DR 1-102(A)(4).

The panel recommended that respondents be suspended from the practice of law for one

year. The board adopted the findings, conclusions and recommendations of the panel and further recommended that costs be taxed to respondents.

Laurence A. Turbow, Ellen S. Mandell and Marshall J. Wolf, for relator.

Sanford J. Berger, for respondent Robert M. Fertel.

Robert M. Fertel, for respondent Sanford J. Berger.

Per curiam. Based upon review of the record, including the exhibits, we concur in the findings and recommendations of the board. Respondents, Sanford J. Berger and Robert M. Fertel, are each hereby suspended from the practice of law in Ohio for one year. Costs taxed to respondents.

Judgment accordingly.

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT, H. BROWN and RESNICK, JJ., concur.

DR 1-102 of OHIO SUPREME COURT'S CODE OF PROFESSIONAL RESPONSIBILITY

DR 1-102 MISCONDUCT.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-103 of OHIO SUPREME COURT'S CODE OF PROFESSIONAL RESPONSIBILITY

DR 1-103 DISCLOSURE OF INFORMATION TO AUTHORITIES.

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

(C) Any knowledge obtained by a member of a committee or subcommittee of a bar association designed to assist lawyers with substance-abuse problems shall be privileged for all purposes under DR 1-103, provided such knowledge was obtained while

such member was performing duties as a member of such committee or subcommittee.

DR2-106 of OHIO SUPREME COURT'S CODE OF PROFESSIONAL RESPONSIBILITY

DR2-106. FEES FOR LEGAL SERVICES

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or pawyers performing the services.

(8) Whether the fee is fixed or contingent.

DR9-102(B)(4) of OHIO SUPREME COURT'S CODE OF PROFESSIONAL RESPONSIBILITY

DR9-102(B) A lawyer shall:

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

OHIO CONSTITUTION

ARTICLE IV SECTION 2(B)(1)(g)

(B)(1) The supreme court shall have original jurisdiction in the following:

* * * *

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters related to the practice of law.

SUPREME COURT OF OHIO'S RULES FOR THE GOVERNMENT OF THE BAR OF OHIO (1991/1992) RULE V(5)(a)

RULE V(5)(a) Application of Rule; Authority and Duty of Bar Committees and Dsiciplinary Counsel.

From and after the effective date of this rule, all proceedings with regard to mental illness and complaints amd grievances involving alleged misconduct by Justices, judges and by attorneys and counselors at law; all proceedings for the discipline of such Justices, judges and attorneys and counselors at law, persons under suspension, probation or disbarred from the practice of law; and all proceedings for the reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Disciplinary Counsel and any Certified Grievance Committee shall investigate any

matter filed with it and may cause a complaint to be filed pursuant to this rule in cases where it finds probable cause to believe that misconduct has occurred or that a condition of mental illness exists.

* * *

The Board of Commissioners, Disciplinary Counsel and the President, Secretary or Chairman of a Certified Grievance Committee of any regularly organized bar association in the state may call upon any Justice, judge or attorney and counselor at law to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such Justice, Judge or attorney and counselor at law shall neglect or refuse to so assist in any such investigation or so to testify.

BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:		
Complaint against		
Sanford J. Berger and Robert M. Fertel 1836 Euclid Avenue Cleveland, Ohio 44115 RESPONDENT	)	No. 90-61 AMENDED COMPLAINT AND CERTIFICATE (Rule V of the Supreme Court Rules for the Government of the Bar of Ohio)
Certified Grievance Committee of the Cuyahoga County Bar Association 1228 Euclid Avenue Suite 370 Cleveland, Ohio 44115 RELATOR	)	

Now comes the Relator and alleges that Sanford J. Berger and Robert M. Fertel, Attorneys at Law, duly admitted to the practice of law in this State of Ohio are guilty of the following misconduct:

COUNT I

1. At all relevant times Respondents in this matter, Sanford J. Berger and Robert M. Fertel, were attorneys-at-law licensed to practice in the State of Ohio and believed to be licensed to practice in the United States District Court for the Northern District of Ohio, Eastern Division and the United States Court of Appeals for the Sixth Circuit.

2. At all relevant times Relator is the Cuyahoga County Bar Association Certified Grievance Committee, authorized by the Ohio Supreme Court to investigate and prosecute alleged violations of the Code of Professional Responsibility.

3. In 1983, Daniel Gurish retained the services of Respondents to represent him in the United States Court of Appeals for the Sixth Circuit as a result of the dismissal of an action titled Daniel Gurish vs. Gerald T. McFaul, Sheriff, bearing the

U.S. District Court Case No. C83-3. For said services, Gurish agreed to pay Respondents a sum certain, to-wit: Two Thousand Five Hundred Dollars ($2,500.00).

4. Respondents were successful in that the United States Court of Appeals for the Sixth Circuit remanded the case to the District Court for further proceedings. The District Court granted summary judgment in favor of McFaul and Respondents again were successful in obtaining a remand from the United States Court of Appeals for the Sixth Circuit. Ultimately, the case of Gurish vs. McFaul was tried to a jury beginning on July 28th through August 2, 1988, and a verdict was returned in favor of Daniel Gurish in the amount of One Hundred Thousand Dollars ($100,000.00). Subsequent to that an award of reasonable attorney fees, pursuant to 42 USC 1988, was requested and that matter was settled for Thirty Thousand Dollars ($30,000.00).

5. As and for fees in this matter, Respondents entered into a "Contingent Fee Agreement" with Gurish on or about April 3, 1987, which called for the Respondents to receive 40% of the proceeds from the trial as attorney fees. Further, Gurish was to receive credit for certain sums he had previously advanced to the Respondents in the earlier proceedings.

6. Approximately one week before trial, Respondents advised Gurish that there was no fee agreement in existence and requested that he sign a "Contingent Fee Agreement" in which Respondents were to receive 50% of any recovery in the Gurish vs. McFaul trial. Gurish, relying upon the representations of Respondents that no prior written fee agreement had been entered, entered into the 50% Contingent Fee Agreement.

7. As a result of the jury's decision in the Gurish vs. McFaul lawsuit,

and as a result of the settlement for the claim for attorney fees, the Cuyahoga County Auditor issued two checks, the first in the amount of One Hundred Thousand ($100,000.00) payable to Respondents and Gurish, and the second in the amount of Thirty Thousand ($30,000.00) payable only to the Respondents as and for attorney fees. Upon receipt of these checks Respondents advised Gurish that their attorney fees pursuant to the agreements were 50% of the One Hundred Thousand Dollars ($100,000.00) plus the entire Thirty Thousand ($30,000.00) received as a result of the settlement of the Attorney Fee Motion, for a total attorney fee of Eighty Thousand Dollars ($80,000.00)

8. Respondents' fees were excessive based upon the contract between Gurish and Respondents, 42 USC 1988, and in violation of DR2-106(A).

COUNT II

9. Relator realleges and reasserts all of the allegations contained in Paragraph 1 through 8 as if fully rewritten herein.

10. Respondents' actions in entering into two separate fee agreements and advising Gurish that the first agreement did not exist amounts to engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in inviolation (sic) of DR1-102(A)(4).

COUNT III

11. Relator realleges and reasserts the allegations contained in Paragraphs 1 through 10 as if fully rewritten herein.

12. In response to the Court's jury verdict and the settlement of the Attorney Fees Motion, the Cuyahoga County Auditor issued two checks in March, 1989, in the amount of One Hundred Thousand Dollars ($100,000.00) and Thirty Thousand Dollars

($30,000.00) respectively. These checks, as of the date of the investigatory hearing, were being held by Respondents who refused to negotiate same unless Gurish will acquiesce to their demand for Eighty Thousand Dollars ($80,000.00). Said refusal to negotiate the checks and promptly to pay funds to their client violates DR9-102(B).

COUNT IV

13. Relator reasserts and realleges all the allegations contained in Paragraphs 1 through 12 as if fully rewritten herein.

14. Respondent Fertel, though duly notified, failed to appear at an investigatory hearing scheduled on this complaint on or about February 8, 1990, before the Grievance Committee of Cuyahoga County Bar Association, despite notice to him that his appearance was mandatory.

15. Respondent neither appeared at the hearing nor did he contact the

Grievance Committtee (sic) to inform him that he would not appear.

16. Respondent Fertel's conduct in failing to appear at the investigator hearing violates Government of the Bar Rule 5(a): by neglecting or refusing to assist the Certified Grievance Committee's investigation.

COUNT V

17. Relator reasserts and realleges all the allegations contained in Paragraphs 1 through 16 as if fully rewritten herein.

18. The Respondents Sanford J. Berger and Robert Fertel caused to be filed a case entitled Berger and Fertel v. Daniel Gurish, Cuyahoga County Court of Common Pleas Case No. 171154; previously Daniel Gurish had filed a Complaint against the Respondents Sanford Berger and Robert Fertel in the Court of Common Pleas, Case No. 171081. The lawsuits between the parties related to the issue of fees in the

federal court representation provided by Berger and Fertel on behalf of Gurish.

19. On or about May 30, 1990, the parties entered into a Journal Entry, a copy of which is attached hereto and incorporated herein as Exhibit "A".

20. Pursuant to the terms of the negotiations resulting in that Journal Entry, Mr. Gurish was required to dismiss his Complaint before the Cuyahoga County Bar Association against Respondents Berger and Fertel. In addition, Mr. Gurish and the Respondents were required to decline to respond substantively to any inquires (sic) made by any bar association investigating any complaint or grievance matter currently pending or to be filed.

21. The terms of the Journal Entry which were negotiated, in part by the Respondents, were in violation of DR1-102(A)(2), (5), (6) and DR1-103(A). In addition, the terms of the agreement,

pursuant to which neither Mr. Berger, Mr. Fertel, nor Mr. Gurish were permitted to cooperate with the investigators of the Certified Grievance Committee of the Cuyahoga County Bar Association, were in violation of GOV.R.5, which requires attorneys licensed in the State of Ohio to cooperate with investigations conduct by Certified Grievance Committees or Disciplinary Counsel.

Respectfully submitted,

/s/ Laurence A. Turbow
LAURENCE A. TURBOW - #6666
Attorney for Relator
24500 Chagrin Boulevard - #101
Beachwood, Ohio 44122
(216) 831-8838

/s/ Ellen S. Mandell
Ellen S. Mandell - #12026
Attorney for Relator
24500 Chagrin Boulevard - #101
Beachwood, Ohio 44122
(216) 831-4240

/s/ Marshall Wolf / ESM
Marshall Wolf - #0010381
Attorney for Relator
1717 East Ninth Street
Cleveland, Ohio 44114
(216) 623-9999

STATE OF OHIO)		IN THE COURT
	(SS:	OF COMMON
COUNTY OF CUYAHOGA)		PLEAS
		CASE NO. 171081 (Consolidated with Case No. 171154)
DANIEL GURISH,)		
Plaintiff)		
)		JOURNAL ENTRY
vs.)		
SANFORD J. BERGER, et al.)		
Defendants.)		

This cause came on for hearing this 29th day of May, 1990, upon the Complaint of the Plaintiff, Daniel Gurish versus Sanford J. Berger, Esq. and Robert Fertel, Esq. He is requesting Declaratory Judgment with respect to a contract involving the rendering of legal services. Consolidated with this case and pending is Case

No.171154, in which the parties are reversed with an additional defendant, Thomas L. Meros, Attorney for the Plaintiff in the instant case.

In the midst of trial and after full discussion with all parties, the Court finds that an agreement has been reached whereby all matters will be settled, the terms of which are as follows:

The parties have agreed to settle their differences and as a result thereof Case No. 171154 and Case No. 171081 are to be dismissed with prejudice as to all claims with plaintiffs in both cases paying the costs.

The parties have further agreed that a prior Complaint filed by Daniel Gurish with the Cuyahoga County Bar Association against Messrs. Berger and Fertel will be dismissed by him in the form of a letter to be prepared and signed by him subject to

approval of the defendants.

The parties have further agreed that the case filed in Federal District Court by Messrs. Berger and Fertel against the Cuyahoga County Bar Association, Messrs. Gurish and Meros, will be dismissed with prejudice by the plaintiffs as against defendants Gurish and Meros with prejudice at plaintiff's costs; the Federal law suit being dismissed on or before June 8, 1990.

The parties have further agreed that all of these matters will be held in strictest confidence, that no details are to be disclosed by any party thereto relative to the terms of the settlement, any amounts paid, or other actions may be taken by any party.

The parties further agree that any inquiries made by them by any bar association or member of the news media will result in a response limited to the

fact that the matters have been resolved.

It is, therefore, ORDERED, ADJUDGED and DECREED, that Case Nos. 171081 and 171154 be marked settled and dismissed at plaintiffs' costs.

It is further ORDERED, ADJUDGED and DECREED that any violation of the confidentiality clause of the agreement reached by the parties will be subject to action by the Court for contempt.

/s/ Robert M. Lawther
ROBERT M. LAWTHER, JUDGE

Dated: May 30, 1990.

/s/ Daniel Gurish
DANIEL GURISH

/s/ Sanford J. Berger
SANFORD J. BERGER, ESQ.

/s/ Thomas L. Meros
THOMAS L. MEROS,ESQ

/s/ Robert M. Fertel
ROBERT FERTEL, ESQ.

Exhibit "A" VOL 1263 PG 520

CERTIFICATE

The undersigned Howard Besser of the Certified Grievance Committee of the Cuyahoga County Bar Association hereby certifies that Laurence Turbow, Ellen Mandell and Marshall Wolf are duly authorized to represent Relator in the premises and have accepted the responsibility of prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists to warrant a hearing on such complaint.

Dated _____, 19____

_____

Chairman, Certified
Grievance Committee